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THE

CALCUTTA

LAW REPORTS

OF

CASES

DECIDED BY THE

HIGH COURT, CALCUTTA,

ALSO

JUDGMENTS OF H. M.'S PRIVY COUNCIL.

EDITED BY

G. S. HENDERSON,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

VOLUME V.

Calcutta:

BROWN & CO., LAW BOOKSELLERS AND PUBLISHERS,

12, GOVERNMENT PLACE.

1880.

CALCUTTA:

PRINTED BY A ACTON, AT THE CALCUTTA CENTRAL PRESS COMPANY, LIMITED,

5, COUNCIL HOUSE STREET.

The Hon.	Sir Richard Garth, *Knight,*	*Chief Justice.*
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The mode of citation of the volumes of the CALCUTTA LAW REPORTS will be as follows:—

1 C. L. R., 100.

TABLE OF CASES REPORTED

IN THIS VOLUME.

PAGE.

A.

Abdool Hakeem *v.* Shibkristo Sircar 455
Abdool Khan *v.* Tokee Bibee ... 458
Abdul Kureem *v.* Chukhun ... 253
Abdur Rohman *v.* Sakhina ... 21
Administrator-General *v.* Gocool Chunder Gossami 569
Akul Gazee *v.* Ameenooddeen ... 41
Ameenooddeen *v.* Akul Gazee ... 41
Angelis, G. de *v.* C. K. Mayapa Setty 57
Anundmoyi *v.* Mudun Mohun Saha 49
Asad Ali Khan *v.* Kanto Prosad Hazari 452
Aushutosh Dutt *v.* Doorga Churn Chatterjea 296
Ava and Brenhilda, In the matter of 307, 321

B.

Bank of Bengal *v.* M. A. Mendies 586
Becharam Paul *v.* Bhugwan Chunder Ghose 522
Behari Hajdi, In the matter of ... 239
Bharut Chunder Roy *v.* Kali Dass Dey 545
Bhuggobutty Churn Mullick *v.* Cally Churn Mullick 108
Bhugwan Chunder Ghose *v.* Becharam Paul... 522
Bissen Dass Singh *v.* Sheo Prosad Singh 29
Bissur Lall Sahoo *v.* Luchmeser Singh... 477
Bissonath Adhicari *v.* H. H. Cannon 154

PAGE.

Bissonath Dinda *v.* Doyaram Jana. 565
Bonomali Ruj *v.* Kristo Lal Ghose 43
Brenhilda and Ava, In the matter of... ... ... 307, 321
Brojendro Coomar Roy *v.* Gopal Chunder Roy 338
Brown *v.* Cutts 487
Busaruddin *v.* Ishan Chunder Roy 132

C.

Cally Churn Mullick *v.* Bhuggobutty Churn Mullick 108
Cannon, H. H. *v.* Bissonath Adhicari 154
Cassim Hossein Soorty *v.* Lee Phee Chuan 157
Chatterjea, Doorga Churn *v.* Aushutosh Dutt 296
Chatterjea, Kali Coomar *v.* Tara Prosunno Mookerjea 517
Chatterjea, Kedar Nauth *v.* Nittyo Kali Debea 368
Chidambarah Chettiar *v.* Gouri Natchiar 6
Chooneelall Dutt *v.* Radha Kissen Rowra Dakua 172
Chukhun *v.* Abdul Kureem ... 253
Chunder Coomar *v.* Mahomed Zahur Alum 449
Chunder Kant Mookerjea *v.* Koomul Chunder Dass 284
Chunder Money Dossee *v.* Hurry Doss Mitter 557
Chundramoney Dossee *v.* Moti Lall Mullick 496
Chundermun Misser *v.* Sumrun Thakur 26
Chunder Nath Deb, In the matter of 372

PAGE.

Chutraput Singh, In the matter of 200
Collector of Madura *v.* Ramaswami Chetti 341
Cutts *v.* Brown 487

D.

Darimbya Debbya *v.* Nilmoney Singh Deo 465
Dabee Doyal Singh *v.* Gonesh Pandey 36
Debendro Nath Mullick *v.* Govind Lall Seal 527
David, A., In the matter of ... 574
Delputti Singh *v.* Rajah Lall ... 374
Dhuniram *v.* The Empress 366
Dinonath Surma Sirkar *v.* Ram Chunder Bysack 470
Doorga Churn Chatterjea *v.* Aushutosh Dutt 296
Doyaram Jana *v.* Bissonath Dinda 565
Dukhy Bebee *v.* Kali Churn Shaw 505
Duli Chund *v.* Kokil Singh ... 243
——— *v.* Mitterjeet Singh ... 243
Dwarka Dass *v.* Rai Sita Ram ... 430

E.

Elahee Bux Chowdhry *v.* Kally Mohun Mookhopadhya 519
Empress *v.* Dhuniram 366
Empress *v.* Hari Kisto Biswas ... 209
Eusuff *v.* Shama 21

G.

Ganges Manufacturing Co. *v.* Soorujmull 533
Gobind Chunder Roy *v.* Sibnath Shaw 171
Gocool Chunder Gossami *v.* Administrator-General 569
Gogun Chunder Sircar *v.* J. W. Laidley 189
Gonesh Lal *v.* Sheo Golam Singh 211
Gonesh Pandey *v.* Debee Doyal Singh 36
Gopal Chunder Roy *v.* Brojendro Coomar Roy 338
Gopal Singh *v.* Roy Bunwaree Lall Sahoo 181

PAGE.

Gopi Mohun Mozoomdar *v.* A. Hills 33
Gouri Natchiar *v.* Chidambaram Chettiar 6
Govind Lall Seal *v.* Debendro Nath Mullick 527
Grish Chunder Talookdar, In the matter of 364
Gunga Pershad *v.* Sheo Dyal Singh 224

H.

Hanuman Sahoy *v.* Pursidh Narain Singh 576
Harak Narain Singh *v.* Luchmi Bux Roy... 287
Haran Chunder Chatterjea *v.* Prosunno Coomar Roy Chowdhry... 599
Hari Kisto Biswas *v.* Empress ... 209
Hills *v.* Gopi Mohun Mozoomdar 33
Hunooman Dass *v.* Thakur Dass... 73
Hurdai Narain Sahu *v.* Ruder Perkash Misser 112
Hurdey Narain Singh *v.* Sheo Sunkur Sahoy 194
Hurro Sundari Debia *v.* Kesub Chunder Acharjya 257
Hurry Dass Ghose *v.* S. M. Jogendro Nundinee Dassee 65
Hurry Dass Mitter *v.* Chunder Money Dossee 557

I.

Ishan Chundra Banerjea *v.* Lochun Gopi 559
Ishan Chunder Roy *v.* Bussarud-din 132

J.

Jadubar Mookerjea, In the matter of... 359
Jehangir Mahomed *v.* Mahomed Aijad 370
Jadoo Lal Mullick *v.* Kali Kissen Tagore 97
Jogendro Nundinee Dossee *v.* Hurry Dass Ghose 65
Joggessur Roy, In the matter of... 170

PAGE.

Joggobundhu Mukerjea *v.* Ram Chunder Bysack 548
Jogodeshuri Dabia *v.* Mrinamoyi Dabia 361
Jubraj Roy *v.* W. Mackenzie ... 231
Jumoonah Pershad *v.* Zaibunnissa 268

K.

Kali Dass Dey *v.* Bharut Chunder Roy 545
Kali Churn Shaw *v.* Dukhy Bebee 505
Kali Coomar Chatterjea *v.* Tara Prosunno Mookerjea 517
Kali Kissen Tagore *v.* Jadoo Lal Mullick 97
Kally Churn Dutt *v.* Protab Chunder Ghose... 484
Kally Mohun Mookhopadya *v.* Khabee Bux Chowdhry 519
Kanto Prosad Hazari *v.* Asad Ali Khan 452
Kanye Lall Khan *v.* Khetter Money Dossee 105
Kashi Nath Panday *v.* Monajan... 305
Kawi Manji *v.* Khowaz Nussio ... 278
Kedar Nath Chatterjea *v.* Nittyo Kali Dabea 368
Kesub Chunder Acharjya *v.* Hurro Sundari Debia 257
Khetter Money Dossee *v.* Kange Lall Khan 105
Khowaz Nussio *v.* Kawi Manji... 278
Kishen Dutt Rajah *v.* Mumtaz Ali Khan 213
Kishen Pertab Sahee *v.* Rughoobur Dyal Sahoo 418
Kokil Singh *v.* Duli Chund ... 243
Koomul Chunder Dass *v.* Chunder Kant Mookerjea... 284
Koonj Behari Dhur *v.* Prem Chand Dutt 561
Krishna Moni Chowdhrani *v.* Tarini Kant Lahiri Chowdhry 179
Kristo Lal Ghose *v.* Bonomali Ruj 43
Kusu Bhattu *v.* Ram Bandhu ... 481

L.

Laidley, J. W. *v.* Gogun Chunder Sirkar 189
Lee Phee Chuan *v.* Cassim Hossein Soorty 157

PAGE.

Lochun Gope *v.* Ishan Chundra Banerjea 559
Lokenath Kurmokar *v.* Russick Lall Mudduck 492
Luchmessur Singh *v.* Bissessur Lall Sahoo 477
Luchmi Bux Roy *v.* Harak Narain Singh 287

M.

Mackenzie, W. *v.* Jubraj Roy ... 231
Madura, Collector of *v.* Ramaswami Chetti 341
Mahomed Aijad *v.* Jehanger Mahomed 370
Mahomed Zahur Alum *v.* Chunder Cumar 449
Maniran *v.* Valayet Hossein ... 91
Mayapa Setty, C. K. *v.* G. de Angelis 57
Meajan Mundul *v.* Mutura Kanto Shaha Chowdhry 192
Mendies, M. A. *v.* Bank of Bengal 586
Minu Sirkar *v.* Rhedby Nath Roy 135
Mir Abu Syed *v.* Roy Nund Lall Bose 45
Mitterjeet Singh *v.* Duli Chund .. 243
Modu Soondari Barmonia *v.* Nufur Das Roy... 551
Monajan *v.* Kashi Nath Panday... 305
Mookerjea, Chunder Kant *v.* Koomal Chunder Dass 284
Mookerjea, Jadubar, In the matter of 359
Mookerjea, Nobo Coomar *v.* I. R. Rainey 543
Mookerjea, Tara Prosunno *v.* Kali Coomar Mookerjea 517
Motilal Mullick *v.* Chundra Money Dossee 496
Mrinamoyi Dabia *v.* Jogodeshuri Dabia 361
Mudun Mohun Shaha *v.* Anund Moyi 49
Mullick *v.* Mullick... 108
Mumtaz Ali Khan *v.* Kishen Dutt Rajah 213
Mutura Kanto Shaha Chowdhry *v.* Meajan Mundul... 192

PAGE.

N.

Nam Narain Singh *v.* Sheotuhul Ram 291
Nil Money Singh Deo *v.* Darimbya Debbya 465
Nittyo Kali Debea *v.* Kedar Nauth Chatterjea 368
Nobin Chunder Roy *v.* Sita Nath Shaha 102
Nobo Coomar Mookerjea *v.* I. R. Rainey 543
Nufer Das Roy *v.* Modu Soondari Barmonia 551
Nujib Khan *v.* Poynor Bibee ... 524

P.

Parbutty Churn Sen *v.* Shaik Mandari 513
Pell *v.* Valetta 464
Pitambur Singh, In the matter of... 597
Poynor Bibee *v.* Nujib Khan ... 524
Prangobind Mozoomdar *v.* Surut Soondari Debya 262
Prem Chand Dutt *v.* Koonj Behari Dhur 561
Proby *v.* Proby 1
Prosunno Coomar Roy Chowdhry . Haran Chunder Chatterjea... 599
Prosunno Coomar Santikaree *v.* Shama Churn Chatterjea ... 251
Protab Chunder Ghose *v.* Kally Churn Dutt 484
Pursidh Narain Singh *v.* Hanuman Sahoy 576

R.

Radha Kissen Rowra Dakua *v.* Choonee Lall Dutt 172
Rai Sita Ram *v.* Dwarka Dass ... 430
Rajah Lall *v.* Delputty Singh ... 374
Rajender Nath Roy *v.* S.M. Ranee Putto Sundery Dassee ... 18
Rajlukhy Dassee *v.* Rash Munjury Chowdhrain 515
Rajo Koer *v.* Ram Prosad Dass ... 94
Ramanagra Singh *v.* Ramyad Singh 176
Rama Sami Ayan *v.* Vencatarama Aiyan 347

PA

Rama Swami Chetti *v.* Collector of Madura 3
Ram Awtar Singh *v.* Tulsi Ram ... 2
Ram Bandhu *v.* Kusu Bhattu ... 4
Ram Chunder Bysack *v.* Dinonath Surma Sirkar 4
Ram Chunder Bysack *v.* Joggobundhu Mukerjea 5
Ram Prosad Das *v.* Rajo Koer ...
——————— *v.* Ram Runjun Chuckerbutty 1
Ram Runjun Chuckerbutty *v.* Ram Lall Mukhopadya ... ...
Ram Runjun Chukerbutty *v.* Ram Proshad Dass 1
Ramyad Singh *v.* Ramanagra Singh 1
Ranee Puttoo Sundery Dassee *v.* Rajender Nath Roy ... ...
Rash Munjury Chowdhrain *v.* Rajlukhy Dassee 5
Rainey *v.* Nobo Coomar Mookerjea 5
Rhedoy Nath Roy *v.* Minu Sirkar 1
Roy Bunwaree Lall Sahoo *v.* Gopal Singh 1
Roy Nundo Lall Bose *v.* Mir Abu Syed ... ...
Ruder Perkash Misser *v.* Hurdai Narain Sahu 1
Rughoobur Dyal Sahoo *v.* Kishen Pertab Sahee 4
Russick Lall Mudduck *v.* Lokenath Kurmokar 4

S.

Shaikh Mandari *v.* Parbutty Churn Sen 5
Shamkissore Mundle *v.* Shosheebhoosun Biswas 5
Shosheebhoosun Biswas *v.* Shamkissore Mundle 5
Sakhina *v.* Abdur Rahman ...
Shama Churn Chatterjee *v.* Prosunno Coomar Santikaree ... 2
Syad Mir Ujmudin Khan *v.* Ziaul Nissa Begum ... .
Sheo Dyal Singh *v.* Gunga Pershad 2
Sheo Golam Singh *v.* Gonesh Lall 2

	PAGE.
Shama *v.* Eusuff	21
Sheo Pershad Singh *v.* Kally Dass Singh	138
Sheo Prosad Singh *v.* Bissen Dass Singh	29
Sheo Sunkur Sahoy *v.* Hurdey Narain Sahu	194
Shubratun *v.* Sobhan	21
Sib Nath Shaw *v.* Gobind Chunder Roy	171
Sita Nath Shaha *v.* Nobin Chunder Roy	102
Sita Pershad *v.* Thakur Dass ...	73
Shib Kristo Sircar *v.* Abdool Hakeem	455
S.M. Jogendronundinee Dassee *v.* Hurry Dass Ghose	65
Sobhan *v.* Shubratun	21
Soorujmall *v.* Ganges Manufacturing Co.	533
Sheotuhul Ram *v.* Nam Narain Singh	291
Sumrun Thakur *v.* Chundermun Misser	26
Surut Soondari Debya *v.* Prangobind Mozoomdar	262

T.

	PAGE.
Tagore Kally Kissen *v.* Jadoo Lall Mullick	97
Tara Prosunno Mookerjea *v.* Kali Coomar Chatterjea	517
Tarini Kant Lahiri Chowdhry *v.* Khrisna Moni Chowdhrani ...	179
Thakur Dass *v.* Sitapershad ...	73
Tokee Bibee *v.* Abdool Khan ...	458
Tulsi Ram *v.* Ram Awtar Singh ...	227

V.

Vadrevu Ranganaya Kamma *v.* Vadrevu Bulli Ramaiya... ...	439
Valayet Hossein *v.* Maniran ...	91
Valetta *v.* Pell	464
Vencatarama Aiyan *v.* Ramasawmi Aiyan	347

Z.

Zaibunnissa *v* Jumoonah Pershad	268
Zia-ul-Nissa Begum *v.* Sayed Mir Ujmudin Khan	11

TABLE OF CASES CITED.

PAGE.

A.

Addison *v.* Round ... ... 7 C. & P., 284 159
Adurmoni Deyi *v.* Mussamut Gourunbutty ... 15 B. L. R., 264 117
Ajhola Kooeree *v.* Digamber Singh ... ... 23 W. R., 206 116
Alexiadi *v.* Robinson ... ... 2 Fost. and Fin., 679 160
Ameena Khaton *v.* Radhabinode Misser ... 12 S. D. A., 1856, 596 553
Ameeroonissa *v.* Maharaja Hetnarain Singh ... S. D. A., 1853, 648 143
Appovier *v.* Rama Subha Diyan ... ... 11 Moore's Ind. App., 75 ... 10
Arbuthnot *v.* Betts ... ... 6 B. L. R., 273 456
Aukhil Chunder *v.* Tripoora Soondaree ... 22 W. R., 525 362

B.

Baijun Doobee *v.* Brij Bhookun Lall Awasti ... L. R., 2 Ind. App., 275 119
Bancroft *v.* Mitchell ... ... L. R., 2 Q. B., 549 460
Barrs *v.* Jackson ... ... 1 Y. & C., 585 143
Beeby *v.* Beeby ... ... 1 Hagg., 793 67
Beevor *v.* Beevor ... ... 3 Phill., 261 3
Belaram Kotal *v.* Nund Coomar Chuttoram ... 6 W. R., Act X. R., 45 42
Belcher *v.* Belcher... ... ... 1 Curteis, 444 2
Bennett *v.* Hamill... ... ... 2 Sch. & Lefroy., 576 402
Bentinck *v.* Willinck .. .. 2 Hare 596
Bheknarain Singh *v.* Januk Singh ... ... I. L. R., 2 Cal., 439 ... 117, 226
Bhoyrub Dass Johurry *v.* Doman Thakoor ... 4 C. L. R., 374 109
Bhoobun Mohini Debya *v.* Hurrish Chunder Chowdhry ... ... } L. R., 5 I. A., 138 144
Bickett *v.* Morris ... ... L. R., 1 H. L., Scotch App., 47... 99
Biddle *v.* Bond ... ... 6 B. & S., 225 589
Bissuram Koiree *v.* Empress ... ... 4 C. L. R., 410 506
Bridge *v.* Wain ... ... 1 Stark., 504 59
Broadhead *v.* Broadhead ... ... 5 B. L. R., App., 9 2
Brown *v.* Ackroyd... ... ... 25 L. J., Q. B., 193 2
Buchanan *v.* Avdal ... ... 15 B. L. R., O. C., 256 60
Budroonissa Chowdhrain *v.* Prosunno Coomar Bose ... ... } 14 W. R., F. B., 25 156
Bullock *v.* Loay Aung ... ... 24 W. R., 74 159
Buloor Ruheem *v.* Shumsoonissa Begum ... 11 Moore's Ind. App. 67

C.

Camaroo Pashaon *v.* Pulwan Roy ... ... 16 W. R., 3 371
Chinto Raghunath Rajadikah *v.* Panaki ... 11 Bom., 199 356
Cooper *v.* Bocket ... ... 3 Curteis, 659 567
Coondy *v.* Goburdhun Roy ... ... 22 W. R., 491 485
Cox *v.* Curtis ... ... 27 L. J., P. & M., 73 68

		PAGE.
D.		
D'Aguilar *v.* D'Aguilar	1 Hagg., 786	67
Dabjee Sahoo *v.* Sheikh Tumeezooddeen ...	10 W. R., 102	282
Dadabhai Nassidass *v.* Sub-Collector of Surat...	7 Bom., 82	283
Daimoddee Paik *v.* Kaim Faridar	4 C. L. R., 419	491
De Bussche *v.* Alti	L. R. 8 Ch. D., 287, 314... ...	161
Deendyal Lall *v.* Jugdeep Narain Singh ...	1 C. L. R., 49 ...27, 39, 115, 116,	578
Delhi and London Bank *v.* Woordie	I. L. R., 1 Cal., 249	488
Denniston *v.* Little	2 Sch. & Lef., 11	456
Dhunput Singh *v.* Gooman Singh	11 Moore's Ind. App., 433 ...	144
Dhunsing Gir *v.* Miga Gir	1 Sel. Rep., 153	76
Dickens *v.* Dickens	51 L. J. P. & M., 183	459
Dixon *v.* Yates	5 B. & Ad., 313	536
Doe *v.* Oliver	2 Smith's Leading Cases, 6th Ed., 772	542
Doe d Patteshall *v.* Turford	3 B. & Ad., 890, 897	161
Doe *v.* Pott	2 Doug., 709	223
Doorga Persad Singh *v.* Doorga Koonwari ...	I. L. R., 4 Cal., 190	143
Doorga Prosad Mytee *v.* Joynarain Hazrah ...	2 C. L. R., 370	546
Doyal Chand Laha *v.* Bhoyrub Nath Khettry...	Coryton., 117	494
Durant *v.* Durant	1 Hagg., 734	67
Dwarkanath Bysack *v.* Burroda Persaud Bysack	I. L. R., 4 Cal., 443	499
E.		
Edie *v.* Kingsford	14 C. B., 759	161
Eglinton's Case	2 Ell. & B., 717	460
Eldridge *v.* Burgess	L. R., 7 Ch. D., 411	571
Ellis *v.* Crawford	5 Ir. L. R., 402	528
Empress *v.* Manu Panioli	4 C. L. R., 137	239
Empress *v.* Thakoor Dyal Singh	I. L. R., 3 Cal., 320	290
Eshen Chunder Singh *v.* Shama Churn Bhutto	11 Moore's Ind. App., 7	456
F.		
Farmeloe *v.* Bain	L. R., 1 C. P. D., 445	536
Feda Hossein *v.* Syedoonissa	1 M. Jr. N. S., 80	275
Fernandez *v.* Alves	I. L. R., 3 Bom., 382	567
Ferrers *v.* Ferrers...	1 Hagg.	67
Fife *v.* Brown	6 W. R., 282	274
Flower *v.* Flower	L. R., 3 P. & D., 132	2
Forester *v.* Secretary of State	L. R., I. A., 137	189
Fowle *v.* Fowle	3 C. L. R., 502	2
Fuzeelum Beebee *v.* Omdah Beebee	10 W. R., 469	103
G.		
Gatliff *v.* Bourne	3 M. & Gr., 643	161
Gatha Ram Mistree *v.* Moohita Kochin Atteah Domoonee	14 B. L. R., 298	67, 506
Gifford *v.* Gore-Stackpole	1 Dow., 18...	405
Gobind Chunder Gossami *v.* Rungo Money Dossee	No. 236 of 1869	499
Goldsmid *v.* Stonehewer...	9 Hare, Appx., 40	583
Goono Monee Debia *v.* Ram Kumol Sandle ...	17 W. R., 144	362

		PAGE.
Goopi Krishna Gossami *v.* Nilcomul Banerjea...	13 B. L. R., 461	276
Gopee Bundhoo Shantra Mohapatter *v.* Kalee Pudo Banerjea	23 W. R., 338	245
Gopeekrist Gosain *v.* Gungapersaud Gosain ...	6 Moore's Ind. App., 53	479
Gopeenath Singh *v.* Sheo Sahoy Singh... ...	1 W. R., 315	248
Golab Chand Baboo *v.* Prosunno Coomaree Debia	20 W. R., 89	53
Golami Sahu *v.* Chutterbhooj Patuck	3 C. L. R., 261	516
Goluck Kishore Acharjea *v.* Kesha Majhee ...	15 W. R., 23	484
Goluck Moonee Dassee, *In re*	S. D. A., 1859, 210	56
Government of Bengal *v.* Nawab Jafar Hossein Khan	5 Moore's Ind. App., 498... ...	144
Greehuree Dass *v.* Nundo Kissore Dass ...	11 Moore's Ind. App., 405 ...	78
Greenhill *v.* Ford	2 Shaw's Sc. App , 443	69
Gridhari Lall *v.* Kanto Lall	L. R., 1 I. A., 321... ...	38, 226, 578
Griffiths *v.* Perry	1 E. & E., 680	536
Gunes Gir *v.* Amrao Gir	1 Sel. Rep., 210	76
Gunesh Dutt *v.* Musst. Lall Muttee Kooer ...	17 W. R., 12	54
Gunesh Pandey *v.* Dabee Doyal Singh	5 C. L. R., 36	119, 579
Gunga Das and Mungal Das *v.* Teluk Das ...	1 Sel. Rep., 309	77
Gunga Gobind Mundul *v.* Bhopal Chunder Biswas	19 W. R., P. C., 101	549
Gutha Ram Mistree *v.* Moohita Kochin Attea Domoonee	14 B. L. R., 298	67, 506
Gunga Pershad *v.* Sheo Dyal	5 C. L. R., 224	578
Gunga Pershad Kur *v.* Shumboonath Burman...	22 W. R., 393	553

H.

Harvey *v.* Hall	L. R., 11 Eq., 31	459
Heald *v.* Carey	11 C. B., 977	161
Hem Chunder Ghose *v.* Radha Pershad Paleet...	23 W. R., 440	235
Hewitson *v.* Sherwin	L. R., 10 Eq., 53	459
Hills *v.* Clark	14 B. L. R., 367	276
Hinde *v.* Liddell	L. R., 10 Q. B., 255	59
Hong-Kong and Shanghai Bank *v.* Baker ...	7 Bom., 186	159
Hunooman Pandey's Case	6 Moore's Ind. App., 423... ...	398
Huronath Bhungo *v.* Chunilall Ghose... ...	3 C. L. R., 165	516

I.

Imperial Bank *v.* London and St. Katherine's Dock Co.	L. R., 5 C. H. D., 195	536
Ishan Chunder Mitter *v.* Buksh Ali Soudagur...	1 Marshall, 614	480

J.

Jack *v.* Walsh	4 Ir. L. R., 254	528
Jackson *v.* North-Eastern Railway Co.... ...	L. R., 5 Ch. D., 844	571
Jackson *v.* Spittall...	L. R., 5 C. P., 542	275
Jamoona Dassia Chowdhrani *v.* Ram Soondari Dassia Chowdhari	L. R., 3 I. A., 72	380
Jarvis Charity, *In re*	1 Dr. & Sm., 97	571
Joan Mull *v.* Munnoo Loll	1 M. Ir. N. S., 219	273
Joba Singh, The Case of...	4 S. D. A. Rep., 271	149
"John Chism," The Case of	"Englishman," October 29th, 1868	311
Jones *v.* Jones	L. R., 2 P. & D., 333	2
Jones, In the Goods of	32 L. J. P. & M., 26	526
Jogesh Chunder Dutt *v.* Kali Churn Dutt ...	I. L. R., 3 Cal. (F. B.,) 30 ...	521
Joyram Lall Mahtoon *v.* Stewart	7 W. R., 453	362

K.

Kalee Prosunno Bose *v.* Dinonath Bose Mullick 18 W. R., 435 ... ...
Kalipershad *v.* Ramchurn... ... ... I. L. R., 1 Alla., 159 ... ...
Kasam Pirbhai, *In re* ... ... 8 Bom., 95 ... ...
Keane *v.* Keane ... ... L. R., 3 P. & D., 52 ... ...
Keats *v.* Keats ... ... 1 Sw. & Tr., 334 ... ...
Kelly *v.* Kelly ... ... 3 B. L. R., App., 4 ... ...
Kennedy *v.* Daly ... ... 1 Sch. & Lef., 355 ... ...
Keoglar *v.* Coringa Oil Co. ... ... I. L. R., 1 Cal., 42... ... ...
Khajah Enaetoollah Chowdhry *v.* Kishen Soondur Surma ... ... 8 W. R., 387 ... ...
Knight *v.* Wiffen ... ... L. R., 5 Q. B., 660 ... ...
Koonjo Mohun Dass *v.* Nobo Coomar Shaha ... I. L. R., 4 Cal., 216 ... ...
Krishnaramani Dasi *v.* Anunda Krishna Bose... 4 B. L. R., 231 ... ...
Kunhi Komapen Kurupu *v.* Changara Changarachan K. C. Ambu ... ... 2 Mad., 313... ... ...
Kurim Chand Paray *v.* Brojonath Mundle ... Case No. 632 of 1873 ... ...
Kuroonakur Mahotee *v.* Neeladhro Chowdhry... 14 W. R., 107 ... ...

L.

Lakho Koer *v.* Hurree Kishen Roy ... ... 12 W. R., 3 ... ...
Lakshmibai *v.* Haribin Ravji ... ... 9 Bom., 1 ... ...
Lakshmibai *v.* Vithal Ramchundra ... ... 9 Bom., 53 ... ...
Lala Gobind Prasad *v.* Doulut Batti ... ... 6 B. L. R., Appx., 85 ... ..
Laljeet Singh *v.* Rajcoomar Singh ... ... 12 B. L. R., 273 ... ...
Lalla Bunsheedur *v.* Koonwar Dutt Singh ... 10 Moore's Ind. App., 471 ...
Lalla Kundu Lall *v.* Lalla Kalee Pershad ... 22 W. R., 307 ... ...
Leer *v.* Yates ... ... 3 Taunt., 387 ... ...
Lekhraj Roy *v.* Kunya Singh ... ... L. R., 4 I. A., 223 .. ..
Lilanund Singh *v.* Thakur Munorunjun Singh... 13 B. L. R., 133 .. ..
Lloyd *v.* Jones ... ... 9 Ves. Jun., 37 ... ...
Luchmee Chund *v.* Zorawar Mull ... ... 8 M. I. A., 291 ... ...
Luchmiput Singh Dugar *v.* Mirza Khairat Ali... 4 B. L. R., 18 ... ...
Lukhee Kaunto Dass Chowdhry *v.* Sumeerudi Lusker ... ... 13 B. L. R., 243 ... ...

M.

Madho Rao Aga *v.* Thakoor Pershad ... ... 3 Agra., 127 ... ...
Mahabeer Persad *v.* Ramyad Singh ... ... 12 B. L. R., 90 ... ...
Mahomed Israil *v.* Wise ... ... 21 W. R., 327 ... ...
Maharaj Tejchund Bahadoor *v.* Sri Nauth Ghose ... . 3 Moore's. Ind. App., 261 ...
Martin *v.* Mackonochie ... ... L. R., 3 Q. B. D., 775 ... 313,
Meheroonnissa Bibee *v.* Hurchurn Ghose ... 10 W. R., 220 ... ...
Martin *v.* Lawrence ... ... I. L. R., 4 Cal., 655 ... ...
Merceron, *In re* ... ... L. R., 7 Ch. D., 187 ... ...
Marshman *v.* Brookes ... ... 32 L. J. P. & M., 25 ... ...
Manager Raj Durbhungah *v.* Maharaja Coomar Ramaput Singh ... ... 14 Moore's Ind. App., 605 ...
Merchant Banking Co. *v.* Phœnix Bessemer Steel Co. ... ... L. R., 5 Ch. D., 205 ... ...
McCord *v.* McCord ... ... L. R., 3 P. & D., 237 ... ...
MacEwan *v.* Smith ... ... 2 H. of L. Cases., 309 ... ...

		PAGE.
Miller *v.* Race	1 Smith's Leading Cases... ...	593
Milne *v.* Milne	40 L. J. P. & M., 13	3
Mohabeer Pershad *v.* Ramyad Singh	2 W. R., 192	579
Modho Dyal Singh *v.* Kolbur Singh	B. L. R., F B., 1018	115
Mohamed Arab *v.* Noor Buksh	25 W. R., 127	549
Mohamed Rasid Khan Chowdhry *v.* Jadoo Mirda	20 W. R., 401	235
Mahomed Shumsool Hooda *v.* Shewukram ...	22 W. R., 409	563
Mohunt Gopal Doss *v.* Mohunt Kerperam Doss	S. D. A. 1850, 250...	77
Mohunt Persoram Das *v.* Mohunt Anand Das...	Reg. App., No. 164 of 1874 ...	77
Mohunt Rama Nooj Doss *v.* Mohunt Debraj Doss	6 Sel. Rep., 262	76
Mongula Dossee *v.* Sharoda Dossee	20 W. R., 48	362
Molook Chand Mundul *v.* Modhoosoodun Bachusputty	16 W. R., 126	133
Moonshee Jowhur Ali *v.* Baboo Ram Chund ...	24 W. R., 418	549
Moore *v.* Doherty	5 Ir. L. R., 449	528
Moro Vishvanath *v.* Gunesh Vithal	10 Bom., 444	115
Morris *v.* Livison	45 L. J. C. P., 409	60
Muddun Thakoor *v.* Kanto Lall	L. R., 1 I. A., 321 ...	38, 118
M. S. Radha *v.* Mussamut Kour	W. R., Gap. Vol., 148	553
Mulchand Joharimul *v.* Suganchand Shivdas ...	I. L. R., 1 Bom., 23	275
Munoo Dassee *v.* Ishun Chunder Banerjea ...	15 W. R., 245	485
Munrunjun Singh *v.* Rajah Lelanund Singh ...	3 W. R., 84	150
Mussamut Gourab Kooer *v.* Gungadhur Pershad	4 C. L. R., 398	116
Mussamut Laku Kowar *v.* Roy Hari Krishna Singh	3 B. L. R., 226	144

N.

Nagalinga Mudali *v.* Subbiramaniya Mudali ...	1 Mad., 77	115
Narain Das *v.* Bindrabun Das	2 Sel. Rep., 151	77
Narain Dhara *v.* Rakhal Gain	I. L. R., 1 Cal., 1	506
Narain Singh *v.* Shimbhoo Singh	L. R., 4 I. A., 15	228
Nepoor Aurut *v.* Jurai	19 W. R., 73	22
Newsome *v.* Newsome	L. R., 2 P. & D., 306	68
Nezam Begum *v.* Hafiz Moulvie Syud Ajeeb Ahmed	... ...	525
Nobin Chunder Chuckerbutty *v.* Issur Chunder Chuckerbutty	9 W. R., 505	54, 554
Nobin Chunder Coondoo *v.* Jogendra Nath Bhuttacharjea...	25 W. R., Cr., 18	204
Nuffar Chunder Shaha *v.* Gossain Jysingh Bharuttee	3 W. R., Act X, 144	145
Nugender Chunder Ghose *v.* S. M. Kaminee Dossee	11 Moore's, Ind. App., 241 ...	119
Nund Coomar Banerjea *v.* Phillip	8 W. R., 385	528

O.

Omed Rai *v.* Heera Lall	1 S. D. A., N. W. P., 618 ...	399
Omirtolall Dey, *In re*	I. L. R., 1 Cal., 78	171
Orr Ewing *v.* Colquhoun	L. R., 2 App. Ca., 839	100
Ottoway *v.* Hamilton	L. R., 3 C. P. D., 393	2
Otter *v.* Vaux	2 Kay & Johnson, 650	229
Owen *v.* DeBeauvoir	16 M. L. W., 547	531

PAGE.

P.

Pallaravy Mudali *v.* Audimula Mudali ... .. 5 Mad., 420 276
Parbutty Bewah *v.* Woomatara Dabee ... ... 14 B L. R., 201 495
Parkinson *v.* Hanbury ... ... 2 De G. J. & S., 474 223
Pearee Mohun Mookerjea *v.* Rajkisto Mookerjea 20 W. R, 385 133
Pearson *v.* Dawson ... ... 1 E. B. & E., 448 536
Periasami *v.* Periasami ... ... L. R., 5 I. A., 61 440
Pickard *v.* Sears ... ... 6 Ad. & E., 469 541
Pilcher *v.* Hine ... ... 24 W. R., (Eng.), 619 488
Pitambur Sen *v.* Debnath Roy Chowdhry ... 18 W. R., 132 63
Price *v.* Torrington ... ... 1 Smith's L. C. 161
Promotho Dossee *v.* Radhika Persaud Dutt ... 14 B. L. R., 175 499
Prosono Koomar Tagore *v.* Ram Mohun Doss ... S. D. A., 1855, 16 145
Pry *v.* Hunter ... ... Abbot, 431 60

R.

Rai Mohun Roy *v.* Wise ... ... 16 W. R., Cr., 24 203
Rajah Lilanund Singh *v.* Thakur Munorunjun Singh ... ... 13 B. L. R., 133 144
Rajah Lilanund Singh *v.* Thakur Munorunjun Singh ... ... 5 W. R., 101 151
Rajah Modenarain Singh *v.* Kantlall ... ... S. D. A., 1859, 1572 143
Rajah Monmohun Singh *v.* Watson ... ... 2 Hay, 398 144
Rajah Muttu Ramalinga Setupati *v.* Perianayagum Pillai ... ... L. R., 1 Ind. App., 209 76
Rajendro Naran Takore *v.* Saroda Soonderi Debia ... ... 15 W. R., 548 380
Rajah Ram Tewary *v.* Luchman Persad ... B. L. R., F. B., 731 ... 115, 122
Rakestraw *v.* Brewer ... ... 2 P. W., 571 223
Raphael *v.* Bank of England ... ... 17 C. B., 161 593
Rasmoni Debea *v.* Pran Kishen Das ... ... 4 Moore's Ind. App., 392 ... 600
Ram Bhurose Singh *v.* Bissesser Narain Mahata ... ... 18 W. R., 455 104
Ram Churn Das *v.* Chutter Bhoje ... ... 7 Sel Rep., 205 77
Ram Chunder Chuckerbutty *v.* Brojonath Mozumdar ... ... 4 C. L. R., 247, 252 ... 363, 399
Ram Rutton Das *v.* Bunmalee Das ... ... 1 Sel. Rep., 170 76
Ram Sahai *v.* Sheo Prosad Singh ... ... 4 C. L. R., 226; L. R., 6 Ind. App., 99, ... 39, 115, 118, 226, 578
Reg. *v.* Barry ... ... 28 L. J. M. C., 86 463
Reg. *v.* Fletcher ... ... L. R., 1 C. C., 320 460
Reg. *v.* Governor of Newgate ... ... 6 B & S., 376, 391 460
Reg. *v.* Bholanath Sen .. .. I. L. R., 2 Cal., 23 234
Reg. *v.* Rai Baiton ... ... 10 Bom., 166 239
Reg. *v.* Smith ... ... 4 W. R., Cr. R., 31 597
Reg. *v.* Wazira ... ... 8 B. L. R., App., 63 597
Raj Kumar Nobodip Chundro Deb Burman *v.* Rajah Bir Chunder Manikya ... ... 25 W. R, 404 506
Rewat Lall Singh *v.* Khurrack Dharee Singh ... 12 W. R., 167 528
Rollo *v.* Smith ... ... 1 B. L. R, O. C., 10 543
Rojers *v.* Hunter ... ... 1 M & W., 63 159
Roop Narain Singh *v.* Gujadhur Pershad Narain ... ... 9 W. R., 297 393
Roy Narain Dass *v.* Nownit Lall ... ... 4 C. L. R., 67 115
Rubia Khanum *v.* Wise ... ... 23 W. R., 329 54
Rughoo Nath Pershad Singh *v.* Byjnath Sahoy 24 W. R., 349 186
Rugonee Kant Mitter *v.* Prem Chand Bose ... 1 Marsh., 241 553

PAGE.

S.

Sadabart Prasad Sahu v. Foolbash Kooer ... 13 B. L. R, F. B., 31 ... 27, 177
Sadasiva Pillai v. Ramalinga Pillai ... ... 24 W. R, 193 191
Sandial v. Maitland ... ... Fulton., 475 499
Sante Ram Panjah v. Bykunt Parya ... ... 19 W. R., 280 133
Saruth Singh v. Bheenuck Sahoo ... ... 12 W. R., 522 247
Schoole v. Sall ... ... 1 S ch. and Lef., 176 589
Severin v. Keppel ... ... 4 Esp., 156 159
Shama Pershad Roy Chowdhry v. Hurro Pershad Roy Chowdhry ... ... 3 W. R., P. C., 11 521
Shama Soonduree v. Shurut Chunder Dutt ... 8 W. R., 500 555
Sham Lall Mullick v. S. M. Monmohenee Dossee ... ... No 7 of 1878 109
Sheikh Guni Mahomed v. Moran ... ... 2 C. L. R., 370 546
Sheikh Munglo v. Durga Narain Nag ... ... 25 W. R., Cr., 74 204
Sheo Nundun Singh v. M. S. Ghunsam Kooeree ... ... 21 W. R., 143 116
Sib Chunder Mullick v. Treeporah Soondry Dossee ... ... Fulton, 98 499
Siffkin v. Davis ... ... Kay Appx., 21 583
Sitanath Mookerjea v. Sreemutty Haimabutty Dabee ... ... 24 W. R., 377 67
Setaram Bhat v. Sitaram Gonesh ... ... 6 Bom.. 250 363
Slatterie v. Pooly ... ... 6 M & W., 664 333
Sudanundo Mytee v. Nowrutton Mytee ... 16 W. R., 289 34
Smith v. McGuire... ... ... 27 L. J., Ex., 465 60
S. M. Ajhola Kooeree v. Digamber Singh ... 23 W. R., 206 116
S. M. Anundomohey Dossee v. Doe, E. I. Co.... 8 Moore's Ind. App., 43 144
Soorjee Money Dossee v. Denobundo Mullick ... ... 6 Moore's Ind. App., 550 ... 562
Sonai Sardar v. Bukhtar Sardar ... ... 25 W. R., Cr., 46 204
Sonatun Bysack v. S. M. Juggutsoondree Dossee ... ... 8 Moore's Ind. App., 66 302
Sorobur Singh v. Rajah Mohendernarain Singh ... ... S. D. A., 1860, 577 143
Sreemutty Jadomony Dabee v. Sarodaprosad Mookerjea ... ... 1 Boul., 121 553
Sreemutty Nubo Doorga v. S. M. Seetamonee... 23 W. R., 407 549
Sreemutty Matonginy Dossee v. Ram Narain Sadkhan... ... ... 2 C. L. R., 428 44
Sreemutty Pobitra v. Damador Jana ... ... 7 B. L. R., 697 294
Sreenath Koondoo v. Hurree Narain Mudduck. 7 W. R., 399 362
Straker v. Kidd ... ... L. R., 3 Q. B. D., 223 159
Stapylton v Clough ... ... 2 Ell., & Bl., 933 161
Stweld v. Hughes... ... ... 14 East, 308 536
Sumrun Thakoor v. Chundermun Misser ... 5 C. L. R., 26 126
Sunker Lall v. Judoobuns Suhaye ... ... 9 W. R., 285 ... ... - 387
Suraj Bunsi Koer v. Sheo Proshad Singh ... L. R., 6 Ind. App., 99, 4 C. L. R., 226 578
Surbanund Purbut v. Deo Sing Purbut ... 1 Sel. Rep., 296 76
Surwan Hossein v. Shazadah Golam Mahomed ... ... 9 W. R., 171 248
Sussex Peerage Case ... ... 11 Cl. & Fin., 85 161
Sutherland v. Crowdy ... ... 18 W. R., 11 289
Syad Lootf Hossein v. Dursan Lall Sahoo ... 23 W. R., 424 398
Syud Emam Momtazuddeen Mahomed v. Raj Coomar Dass ... ... 23 W. R., 187 245

PA

T.

Tagore v. Tagore ... ... 9 B. L. R., 377 4
Tarucknath Sircar v. Prosunno Coomar Ghose... 19 W. R., 48 5
Thakoor Chunder Paramanick, *In re* ... ... B. L R., F. B., 595 4

U.

Umbica Churn Gupta v. Bholanath Ghosal ... 4 C. L. R., 55 1
Umritanath Chowdhry v. Koonjbehary Singh ... W. R., F. B., 34 1

V.

Vanghan . Weldon ... ... L. R. 1, O. C. P., 47 2

W.

Walker v. MacDonald ... ... 17 L. J. Exch., 377 5
Ward v. Ward ... ... 1 Sw. & Tr., 185 ... ...
Wells v. Wells & Cottam ... ... 33 L. J. P. & M.. 72 ... ...
Wilson v. Wilson ... . 6 Moore's Ind. App., 484 ...
Woodley v. Coventry ... ... 2 H. & C., 164 5
Wright v. New Zealand Shipping Co. ... ... L. R., 4 Exch. Dir., 165 1

Y.

Yamunabhai Narayan Jogonath Bhide v. Narayan Moreshvar Pendse ... ... } I. L. R., 1 Bom., 164 ... ...
Young v. Ward ... ... 10 Hare, Appx., 58 5

ERRATA AND CORRIGENDA.

Page 149, line 23 from top	...	...	after "presumption" insert "There certainly."
„ 150, „ 14 „ „	...	...	for "did not confer" read "did confer."
„ 525, „ 2 from bottom	...	...	„ "Lallmohun Mookerjee" read "Mr. JUSTICE PETERSON."
„ 548, head note	...	...	„ "Sec. 224" read "Sec. 264."

542

CALCUTTA

HIGH COURT REPORTS,

ORIGINAL, APPELLATE, AND REVISIONAL.

[MATRIMONIAL JURISDICTION.]

C. S. M. W. PROBY . . . . . PETITIONER;

AND

W. A. PROBY . . . . . RESPONDENT.

1879
June 12th.

No. 2 of 1879.

Judicial separation, Petition for—Costs of wife—Succession Act, X of 1865, *section* 4—*Divorce Act* (*IV of* 1869), *section* 7.

The foundation of the practice of the Ecclesiastical Courts, requiring the husband, in a suit for judicial separation, to give security for his wife's costs, having been displaced by section 4 of the Indian Succession Act, in respect of persons subject to that Act, that practice ought not to be followed except under special circumstances.

THIS was an application by the petitioner for an order directing her husband, against whom she had filed a petition for a judicial separation, on the ground of cruelty, to pay her alimony, and to deposit in Court such a sum as might be deemed sufficient to defray her costs of, and incidental to, the suit.

The respondent admitted his liability to pay alimony, but opposed the application so far as it asked for an order that he should give security for his wife's costs.

The petitioner had no separate estate.

Bonnaud, for the Petitioner.

Trevelyan, for the Respondent.

1879

PROBY v. PROBY.

Argument.

Bonnaud.—Under section 7 of the Indian Divorce Act, which lays down that the Courts in India shall be guided by rules and principles, as nearly as may be, conformable with the rules obtaining in the Court of Divorce and Matrimonial Causes in England, this Court has jurisdiction to grant the application. A similar application was granted by PHEAR, *J.*, in the case of *Broadhead* vs. *Broadhead*, 5 B. L. R., Appendix 9. It will be contended that section 4 of the Succession Act has made a difference in the Law here, as to a wife's costs, but it must be borne in mind that the case cited was decided subsequently to the Indian Succession Act.

Admitting, however, that that section has made a difference in the *status* of married women, we must assume that the Legislature, in framing the Indian Divorce Act, had that section in view, and from the fact that no provision is made with reference to costs in such a case as this, we may infer that it was not intended that the English rule as to costs which had hitherto prevailed was to be disturbed.

In England a wife is entitled to her costs though she be unsuccessful—*Jones* vs. *Jones*, L. R., 2 P. & D., 333 ; *Keane* vs. *Keane*, L. R., 3 P. & D., 52 ; *Flower* vs. *Flower*, L. R., 3 P. & D., 132 ; *Brown* vs. *Ackroyd*, 25 L. J. (Q.B.), 193. See *Ottaway* vs. *Hamilton*, L. R., 3 C. P. D., 393 ; *Fowle* vs. *Fowle*, 3 C. L. R., 502; *Belcher* vs. *Belcher*, 1 Curteis, 444. The costs of a suit brought with reasonable and probable cause, as it is submitted this is, may be considered necessaries such as a wife may bind her husband for.

[WILSON, *J.*—The rule by which the husband was made to pay his wife's costs was a rule of the Ecclesiastical Courts, independent of the common law liability of a husband to pay for necessaries.]

On the question of alimony the following cases were quoted :—

Ward vs. *Ward*, 1 Sw. & Tr., 185 ; *Kelly* vs. *Kelly*, 3 B. L. R., Appendix 4.

Trevelyan.—Section 4 of the Succession Act practically does away with the English rule requiring the husband to give security for his wife's costs, for the English rule is based on the presumption that the husband is possessed of all the property. Where, however, a wife has separate property of her own, she is

liable, in England, like any other unsuccessful suitor, to be condemned in costs.—*Milne* vs. *Milne*, 40 L. J. P. & M., 13. See *Wells* vs. *Wells* and *Cottam*, 33 L. J. P. & M., 72. Brown on Divorce, 276; *Beevor* vs. *Beevor*, 3 Phill., 261.

Even where the husband has actually deposited money to meet the costs of the wife, the Court has a discretion to disallow payment of the money for that purpose—*Jones* vs. *Jones*, L. R., 2 P. & D., 333.

The principle which has been contended for, of liability for necessaries, cannot apply in such a case as this in India, where the property of the wife does not now vest in the husband.

The case of *Kelly* vs. *Kelly* and *Saunders*, 3 B. L. R., Appx. 4, was before the Succession Act, and therefore decided according to English Law.

In *Broadhead* vs. *Broadhead*, 5 B. L. R., Appx. 9, no reasons are given for the decision, and therefore, the principle on which it was decided not appearing, the Court ought not to be asked to follow that case—see the remarks of the Master of the Rolls in *In re Merceron*, L. R., 7 Ch. D., 187.

Bonnaud in reply.

The following judgment was delivered by the Court (1) :—

The petitioner has instituted proceedings praying for a judicial separation from her husband. She is now scarcely more than 18 years of age; she was married on the 15th of February last, and her husband attained the age of 21 on the 17th of May. They lived together only until the 17th of April, when the petitioner separated herself from her husband; and she alleges cruelty on the part of her husband as the ground on which she claims a judicial separation.

Within four days from the service on her husband of her petition, she served him with notice of her present application for an order directing him to pay her such alimony during the pendency of her suit as this Court might think fit, and also to pay into Court such sum as might be deemed sufficient to pay her costs of, and incidental to, this suit.

(1) PONTIFEX and WILSON, *J.J.*

1879

PROBY v. PROBY.

Judgment.

The application for alimony the husband does not resist, but he opposes the application so far as it asks that he should provide for the petitioner's estimated costs of suit.

This part of the petitioner's application is grounded on the long-established practice of the Ecclesiastical Courts in England, which is still followed by the English Divorce Court, and which was followed by this Court in the case of *Broadhead* vs. *Broadhead*, 5 B. L. R., Appendix S, in which case the husband was the petitioner.

That practice was that, in suits for judicial separation, the husband was ordered to deposit in Court a sum of money to meet the estimated costs of the wife in the suit, and which should be a security to her proctor whatever might be the result of the suit.

It has been urged on behalf of the petitioner that as section 7 of the Indian Divorce Act (IV of 1869) enacts that this Court should act and give relief on principles and rules, as nearly as may be, conformable to the principles and rules on which the English Divorce Court acts and gives relief, and as that Court in suits for judicial separation is to proceed and act on principles and rules as nearly as possible conformable to those on which the Ecclesiastical Courts had theretofore acted and given relief, therefore we are bound to follow the ancient practice, and to direct the husband in this case to deposit the estimated costs of the petitioner in this suit.

The foundation of the practice which prevailed in the Ecclesiastical Court was the absolute right which the law formerly gave the husband upon marriage to the whole of the wife's personal estate, and to the income of her real estate; leaving her destitute of all means to conduct her case.

But that state of the law has been completely altered in India by the 4th section of the Indian Succession Act to which these parties are subject, and which enacts that "no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried."

The foundation of the practice of the Ecclesiastical Courts having been displaced with respect to persons subject to the

Indian Succession Act, we think that the practice itself ought no longer, as a general rule, to be followed. Indeed in the Ecclesiastical Courts the rule was not an absolute one, but was subject to exceptions as in the cases where the wife had separate property of her own, or where it was proved that the husband had no means of his own. And in the English Divorce Court, at least, since the publication of the rules and orders of 1865, there has been a discretion to refuse the wife her costs, even in a case where a deposit of estimated costs had been made by the husband under the order of the Court—*Jones* vs. *Jones*, L. R. 2 Prob. and Div., 333.

Therefore without saying that this Court will, under no circumstances, order a husband to give security for his wife's costs, for, cases of settlement, or particular circumstances might justify it, we are of opinion that it should be done under special circumstances only, and as upon the affidavits no special circumstance appear to us to exist in this case, we must refuse that part of this application, which asks that the husband may be ordered to deposit the estimated costs of the petitioner.

With respect to the question of alimony pending the suit there must be a reference to the Registrar to inquire and report upon the amount of income which the husband is entitled to. As the husband admits his liability to provide alimony, there will be no costs of this application.

[PRIVY COUNCIL.]

1879 *May 27th.*

CHIDAMBARAM CHETTIAR AND OTHERS . APPELLANTS;

AND

GOURI NATCHIER AND ANOTHER . . . . . RESPONDENTS.

Hindu Law—Partition, Suit for—Division, Death of plaintiff before.

In a suit for partition of a joint zemindary by one of two brothers, against the other and against certain other persons who claimed to be either encumbrancers upon, or absolute owners of different villages within the zemindary, issues were fixed in August 1871. The first issue—whether the zemindary was partible and liable to all the incidents of property among Hindus—was tried and decided separately on the 24th August, it being founded that the zemindary was partible. The other issues were subsequently tried and disposed of on the 2nd April 1872, when the final judgment decree was passed. From the judgment it appeared that the Court considered that the finding on the 24th August upon the first issue was an adjudication that each brother was entitled to a moiety of the zemindary subject to such encumbrances as might, on determination of the other issues, be found valid. The plaintiff had died on the 28th March 1872 previous to the final decree. An appeal was preferred by the defendants on the ground that on the death of the plaintiff the suit ought to have been dismissed.

Held, that the decision of the 24th August must be taken as equivalent to a declaratory decree determining that there was to be a division of the estate into moieties, and making the brothers separate in estate from that date.

The principle laid down in the case of *Appovier* vs. *Rama Subha Aiyan*, 11 Moore's I. A., 75, held to apply.

APPEAL from a decision of a Division Bench of the High Court of Judicature at Madras.

The facts of the case are sufficiently set forth in the judgment of the Judicial Committee (1) of the Privy Council, which was as follows :—

This appeal arises out of a suit brought by the younger son of one Gouri Vallabha Tevar, the late zemindar of a dependent

(1) Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

zemindary carved out of the great Sivaganga estate, against his elder brother and against a number of persons who claimed to be either incumbrancers upon or absolute owners of different villages comprised in the zemindary under titles derived from either the father or the elder brother of the plaintiff. The general nature of the suit was for a partition between the brothers, and for the recovery of the plaintiff's share freed from the interests claimed by the other defendants, except to the extent to which the alienations were valid against him under Hindu law. The litigation has now been reduced to the question whether and upon what terms the plaintiff's representatives are entitled to recover his moiety of the village Pattanam from the 3rd defendant, Ramasami Chetti, and his moiety of the village Minnittangudi from the 4th defendant, Ramanadham Chetti. These two defendants are the present appellants.

The facts were very clearly and candidly stated by Mr. Cowie in his opening, and it is unnecessary to recapitulate them; because it is admitted that the decree impeached must stand, unless the appellants can succeed upon one ground. That ground is, that the plaintiff having died on the 28th of March 1872 without issue, the suit which was then pending ought to have been dismissed, inasmuch as the proceedings for a partition had not then gone so far as to affect that severance of interest between the brothers which would prevent the share of the younger from going over to the elder by right of survivorship. The following is the history of the proceedings in the suit, so far as they relate to this question. In August 1871 the first of the issues settled in the cause, viz., "whether the property sued for constituted a zemindary, and if so, whether it is partible or impartible, and whether it is liable to all the incidents of private property," was tried separately, and was determined by the Civil Judge in a judgment of the 24th of that month, which will be hereafter considered. He afterwards tried the other issues in the cause and disposed of them by his judgment and decree of the 2nd of April 1872. On that occasion the point now relied upon was first raised by a petition which bore date the day before, but was not filed in Court until the 2nd of April of that year. On that petition the Judge

1879

CHIDAMBARAM CHETTIAR v. GOURI NATCHIER.

Judgment.

made the following order: "The case has been heard; oral judgment pronounced at the close of the hearing, except in regard to details; and this day the Court delivered its written judgment; petition dismissed." The present appellants appealed against the decree of the 2nd April 1872, and the second of their grounds of appeal is the following: "The plaintiff died after the suit was brought, but before the decree was written or signed, or judgment delivered," and that, under these circumstances, the suit ought to have been dismissed, as no partition could be made."

On the 6th of January 1873, the High Court, before disposing of the appeal, remanded the cause to the Civil Judge, with directions to try whether the partition was complete when the plaintiff died, and when it became so; and also another issue. In his finding upon the first issue, dated the 14th April 1873, the Judge said: "I am of opinion that the partition was complete, *i.e.*, that the brothers became divided in interest, at least on the 24th of August 1871, if not before. I regard that order as equivalent to a decree for dissolution of partnership and for an account. The shares were ascertained, and all that remained to be done was to see what charges, if any, or any particular properties, were good as against the plaintiff. This was a question between the plaintiff and the alienees alone, and first defendant had nothing to do with it." The present appellants appealed against that finding, but the High Court, in its judgment of the 5th of January 1874, expressed its concurrence in it.

Their Lordships have to determine whether that finding was not substantially right. In doing this they dismiss from consideration, as of no weight, the suggestion that, in the month of February 1872, and before the written judgment of the 2nd April of that year was delivered, there had been an oral judgment which would have effected a partition, or at least a severance of interest between the brothers, had there been no such severance previously. They proceed to consider the effect of the proceedings of the 24th of August 1871 on the separate trial of the first issue. The Judge then found that upon the evidence it was quite clear that the estate was in its nature

1879

CHIDAMBARAM CHETTIAR v. GOURI NATCHIER.

Judgment.

partible, that the facts were incontestable, and stated that the defendants' vakils had given in their adhesion to the finding of the Court upon that issue. The judgment then proceeded as follows: "That being so, it is also not disputed that plaintiff is entitled to a moiety of the property left by his father at his death, whatever that moiety may be, subject to all charges then subsisting, and to such charges as have been incurred subsequently, as are of such a character as are recognized under Hindu law to be valid charges upon the estate; but to enable the Court to arrive at a correct conclusion it is necessary to appoint a Commissioner with power to investigate the accounts, and the result will be submitted for this Court's consideration." It then states the points which are to be referred to the Commissioners, all of which had reference to the different mortgages or alienations relied upon by the defendants, other than the plaintiff's brother, and to the question of how far the mortgages had been discharged by the usufruct of the mortgaged property. It then adds: "In accordance with these observations an order will be prepared." No formal order or decree drawn up upon the judgment is to be found in the record, but their Lordships are by no means satisfied that there may not have been one. At all events they are of opinion that by this judgment there was a clear adjudication that the property was partible, and that the rights of the two brothers were, that each should have a moiety, and that the only object of the subsequent proceedings in the suit was to ascertain how far the share of the second brother, which had thus been declared to be a moiety of each village, was affected by the incumbrances and alienations of his father and his elder brother. That this was the clear understanding and intention of the Judge, their Lordships think, appears from the 11th and 19th paragraphs of the judgment of the 2nd of April 1872. In the former he says: "The Court, in its proceedings of the 24th August 1871, held that the estate in question was partible and subject to all the incidents annexed to property among Hindus, and that the plaintiff was entitled to a moiety of the property left by his father at his death, whatever that moiety might be, subject to all charges then subsisting, and to such charges as have been incurred subsequently as are of such

1879

CHIDAMBARAM CHETTIAR v. GOURI NATCHIER.

Judgment.

a character as are recognized under Hindu law to be valid charges upon the estate." In paragraph 19 he says: "This suit has now come before me in another form, and the points I have to determine are the conditions under which plaintiff is entitled to recover a moiety of his ancestral property." He does not in any part of his judgment deal with the question whether the brothers are to be declared separate or whether the property is partible. He treats all that as decided by the former proceedings, and deals only with the question of the plaintiff's right to recover his moiety of each village freed from the incumbrances thereon, or some part of them. It is to be observed that there was no appeal against the judgment of the 24th of August 1871 or its finding on the first issue; and that the first defendant, the elder brother, seems to have thenceforward acquiesced in the decision. For these reasons their Lordships are of opinion that the judgment of the 24th August 1871 must be taken to be equivalent to a declaratory decree, determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from that date, if they had not previously become so. If that be so, the case, though the actual division of the property was not complete, falls within the principle of *Appovier* vs. *Rama Subha Aiyan*, 11 Moore's I. A., 75, and there is no ground for the contention that upon the death of the plaintiff, his interest passed to his elder brother, and not to his own representatives in the course of succession to separate estate as ascertained in the suit.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

[PRIVY COUNCIL.]

SAYAD MIR UJMUDIN KHAN AND ANOTHER . APPELLANTS;
AND
ZIA-UL-NISSA BEGUM AND ANOTHER . . . RESPONDENTS.

1879
March 27th.

Mahomedan Law—Inheritance—Slavery, Status of—Emancipated Slave, Inheritance from—Wula Law—Act V of 1843, *sections*, 2 *and* 3.

A female slave had a child by her master, a Mahomedan, who afterwards emancipated and married her. *Held*, that under section 3 of Act V of 1843 her heirs were entitled in preference to the heirs of her emancipator, to succeed to the share of her husband's estate, to which she had, upon his death in 1842, succeeded as his widow, the Wula rule of Mahomedan Law notwithstanding.

It was the general intention of the Legislature, in passing Act V of 1843 as evidenced by sections 2 and 3, to relieve all persons then subject thereto from all disabilities arising out of the status of slavery.

The words "who may have acquired property by inheritance" in section 3 must be taken to include any person who would have acquired a title to property by right of inheritance, but for some obstacle arising out of the status of slavery.

The words "the person from whom the property may be derived was a slave" apply to any person who has at any time been a slave.

APPEAL from a decision of the High Court of Judicature at Bombay.

Scoble, Q.C., and *Doyne*, for the Appellants.

Leith, Q.C., *Mayne* and *J.B. Norton*, who appeared for the Respondents, were not called upon.

The facts and arguments of Counsel are sufficiently set forth in the following judgment of the Judicial Committee (1) of the Privy Council:—

The question in this appeal regards the succession to one Amir-ul-nissa Begum, who died in 1857. The short history of the case is this: Afzaluddin, who was the last recognized Nawab

(1) Sir JAMES W. COLVILE, Sir ROBERT J. PHILLIMORE and Sir MONTAGUE SMITH.

1879

SAYAD MIR UJMUDIN KHAN v. ZIA-UL-NISSA BEGUM.

Judgment.

of Surat, died on the 8th August 1842. He left two wives, Amir-ul-nissa Begum and Padsha Begum. He also left a daughter, Bakhtiar-ul-nissa Begum, whom we may take for the purpose of this decision to have been born on the 13th March 1821, some four years before the marriage of Afzaluddin with Amir-ul-nissa Begum. Bakhtiar-ul-nissa Begum had been married in her father's lifetime to Mir Jafir Ally, and the issue of that marriage was two daughters, the respondents. Immediately after the death of the Nawab in 1842, there arose considerable discussion regarding the right of succession to him, and there was a contest before one of the Government officers, Mr. Elliott, on that subject. No final decision, however, appears to have been come to until after the passing of Act XVIII of 1848 which placed the administration of the estate of the late Nawab at the disposal of the Governor of Bombay in Council, leaving to them to determine who were entitled to succeed. Their course of action under that Act was to refer the matters in dispute in the first instance to Mr. Frere, the then Agent in Surat. A question as to the status of Amir-ul-nissa Begum was raised before him, it being alleged that she had been a purchased slave of Afzaluddin; that while she was in that state the daughter Bakhtiar-ul-nissa Begum was born; and that four years after the birth of Bakhtiar-ul-nissa, the Nawab, having shortly before the ceremony emancipated her, had married her. This case was then put forward in order to meet the question raised whether, according to Mohamedan law, Bakhtiar-ul-nissa Begum could take any share in her father's estate. As the daughter of a concubine, who was slave girl, she would have been entitled to do so, whereas as the illegitimate daughter of the Nawab by a free woman she might not be. She, therefore, and her husband, who acted for her, were then interested in making out that Amir-ul-nissa Begum had been a slave, whilst the residuaries, who are now represented by the plaintiff and appellant, were interested in maintaining the contrary. Mr. Frere, without deciding anything as to the status of Amir-ul-nissa Begum, but proceeding very much upon the special power that belonged to the Nawab, and the acts of recognition on his part of Bakhtiar-ul-nissa Begum as his daughter, and Amir-ul-nissa as his

wife, reported that the succession was to be divided as follows, viz : That one-sixteenth was to go to Amir-ul-nissa Begum; another sixteenth, making up the eighth to which the widows are entitled under Mahomedan Law, was to go to Padsha Begum, the other widow; that Bakhtiar-ul-nissa Begum was to take the share to which she would be entitled as legitimate daughter, namely, eight-sixteenths, or one-half; and that the remaining six-sixteenths were to be divided between Mir Moinooddin Khan and his brother Mir Kamrooddin, two distant relatives of the Nawab, who filled the character of residuaries according to Mahomedan Law. It is, of course, impossible to go behind the finding of Mr. Frere, which was adopted and confirmed by the Governor in Council, and must be assumed to have determined once and for all the succession of Afzaluddin. Bakhtiar-ul-nissa Begum died in 1845 in her mother's lifetime, Amir-ul-nissa did not die until 1857, and it is conceded that, but for the question that has been raised in this suit, the respondents, her two grand-daughters, would be her only ascertainable heirs. Kamrooddin also died in the lifetime of Amir-ul-nissa Begum.

In this state of things, and a good many years after the death of Amir-ul-nissa Begum, the present suits were instituted by one Fatma-ul-nissa Begum, who claimed to be the sister and heiress of Moinooddin, who, though he had survived Amir-ul-nissa Begum, was then dead; and the title put forward was that, according to the law of Wula, which has been very ably and clearly expounded at the Bar, the person entitled to succeed and take the property of which Amir-ul-nissa Begum died possessed, or to which she was entitled, was Moinooddin, as the male heir of Afzaluddin, who was the emancipator of Amir-ul-nissa Begum, to the disherison of her own natural heirs.

A number of issues were settled in the suit, with many of which it is not necessary to deal. The principal one, and that upon which both the Courts below have decided against the plaintiff in the suit and in favor of the respondents, was that, by Act V of 1843, this right, which was the foundation of the claim of Moinooddin, or of his representative Fatma, was taken away, and it is to that question that their Lordships propose on the present occasion to address themselves. In order to try that question they must,

1879

SAYAD MIR UJMUDIN KHAN v. ZIA-UL-NISSA BEGUM.

Judgment.

of course, assume that the status of Amir-ul-nissa Begum was that which the plaintiff represented it to have been, namely, that having been originally a Rajpoot girl who had been converted to Mahomedanism, she was brought into the zenana of the Nawab as his purchased slave; that she was the mother, whilst still a slave, of Bakhtiar-ul-nissa by him; and that on the day previous to the celebration of the nikah marriage, by which she became his wife, he had emancipated her. It must also be assumed that the Wula rule of the Mahomedan law is such as Mr. Scoble has shown it to be upon the authorities which he cited. The question now to be decided is, whether the Act in question prevents the application of that rule of law, and entitles those parties who, but for it, would have succeeded to their grandmother, as her natural heirs, to take the inheritance. Each of the Courts below has adopted a view of the operation of the Act favourable to the respondents, though not precisely upon the same ground. The Subordinate Judge says: "This Act was passed to declare and amend the law regarding the condition of slavery within the territories of the East India Company; and section 3 runs as follows:—'No person who may have acquired property by his own industry or by inheritance shall be dispossessed of such property or prevented from taking possession thereof, on the ground that such person, or that the person from whom the property may have been derived, was a slave.' Now in the present case the plaintiff alleges that had Amir-ul-nissa been a free woman the defendants would have been her heirs, but because she was a slave, her property goes to her master's relatives. The section appears to me clearly to apply to such a contention." He then discusses Mr. Baillie's view of the effect of the statute, as expressed in Book IV of his Digest of Mahomedan law, and refers to the absence of any discussion on the subject before Mr. Frere, when indeed the question had not arisen, and ends by saying: "I think then that the plea that Amir-ul-nissa's property must go to her husband's relations instead of to her own grandchildren, because, though subsequently emancipated and married, she was originally a slave, is one which the Court cannot entertain, and that the claim is on this ground inadmissible.

1879

SAYAD MIR UJMUDIN KHAN v. ZIA-UL-NISSA BEGUM.

Judgment.

The High Court say on this subject: "We think that Act V of 1843 deprived the plaintiff of any right to bring this suit. Amir-ul-nissa died in 1857 when that Act was in full force. We think that the effect of that Act was to prevent the enforcement of any rights which would, if that Act had not been passed, have arisen out of the status of slavery. The right claimed by the plaintiff rests solely upon the alleged fact that Amir-ul-nissa had been at one time the slave of the late Nawab. He is said by the plaintiff to have enfranchised Amir-ul-nissa, and on the authority of 1 Baillie's Digest, 386, 387, and 3 Hidaya, 444, 445, it is contended that he, as her emancipator, or, he being dead, his nearest male relative, or in default of him, that male relative's heir, would be her heir, and that neither her daughter nor the defendants who are that daughter's daughters are so. That right, if it ever existed, is, in our opinion, one arising out of an alleged property of the late Nawab in Amir-ul-nissa's person and services before he enfranchised her, and as such is one of the rights which every Civil Court in British India is prohibited by section 2 of Act V of 1843, from enforcing. We are not prepared to say whether this case would not also come within the prohibition in section 3 of the same enactment.

The High Court then proceeded mainly upon the second section, and the Subordinate Judge upon the 3rd section of the Act. In their Lordships' opinion both sections point to the conclusion that it was the general intention of the Legislature, in passing this Act, to relieve all persons, then subject thereto, from all the disabilities arising out of the status of slavery; and without saying whether the 2nd section of the Act is sufficient of itself to dispose of the claim in this suit, they have come to the conclusion that the 3rd section at least has that effect.

The section runs thus: "And it is hereby declared and enacted, that no person who may have acquired property by inheritance shall be dispossessed of such property, or prevented from taking possession thereof, on the ground that such person, or that the person from whom the property may have been derived, was a slave." Various arguments have been addressed to their Lordships as to the non-applicability of this enactment to the present case. It was first said that to apply it to this case would be to

1879

SAYAD MIR UJMUDIN KHAN v. ZIA-UL-NISSA BEGUM.

Judgment.

give a retrospective effect to the Act, in violation of the well-known rule of construction. Their Lordships cannot accede to that argument. The Act was in force at the time of the death of Amir-ul-nissa; and the question who is entitled to succeed to her property is determinable by the law as it stood when the succession opened. Their Lordships cannot recognise any vested interest said to have been acquired previous to the passing of the Act by the unascertained persons who might at her death be the then residuary heirs of her husband; or admit that her husband by the act of emancipation, acquired a vested right which the statute could not, except by express and retrospective words, take away. One of his residuary heirs died before the widow, and it is not contended that any interest vested in him. The whole right, if any, which can be asserted under the Wula rule of law is treated as having been in Moinooddin when Amir-ul-nissa died. If he too had died in her lifetime, the right could not have been asserted by his sister and heiress, the plaintiff in the suits. It would have been in some more distant male relative of the Nawab.

It was further contended that the respondents cannot claim the benefit of the statute, inasmuch as they are not persons "who may have acquired property by inheritance," and that the words are to be construed by the Mahomedan law, which gives the property to a preferable class of heirs, viz., the heirs of the husband, the emancipator. This argument seems to their Lordships to reduce the clause to a nullity. They conceive that the words must be taken to include any person who would have acquired a title to property by right of inheritance, but for some obstacle arising out of the status of slavery.

It was argued by Mr. Doyne that in all probability the Legislature had not its mind directed to this somewhat obscure branch of Mahomedan law, and that the section must be taken to apply only to cases in which the person from whom the property is inherited was at the time of his death a slave; but if the third section were to be taken subject to the old Mahomedan law, the master in such a case would be entitled to take the property of the slave; and the son of the slave, or the other natural heirs of the slave, could not be said to be persons "who may have acquired

property by inheritance." The clause upon this construction of it would have no meaning or operation.

Their Lordships cannot accede to the general proposition of Mr. Doyne that the operation of the statute or of this particular section in it is to be confined to the property of persons who at the time of their death were slaves. They are of opinion that in construing this remedial statute they ought to give to it the widest operation which its language will permit. They have only to see that the particular case is within the mischief to be remedied, and falls within the language of the enactment. They find it impossible to say that this is not the case in the present instance.

They have already intimated their opinion that the general scope and object of the statute was to remove all the disabilities arising out of the status of slavery. The rule of Wula whereby the natural heirs of the emancipated were excluded by the heirs of the emancipator of the emancipated was not less such a disability, than the rule of law whereby the natural heirs of an unemancipated slave were excluded by his master or his heirs. As to the language of the Act, the question which arises upon the first words of the section has been already dealt with; but a further argument has been founded upon the words "that the person from whom the property may be derived was a slave." The words are not "was a slave at the time of his or her death," and the term may well be taken to apply to any person who had at any time been a slave. Putting this interpretation upon the statute, their Lordships think that it is sufficient to dispose of this appeal without going into any of the other questions raised, either of law or of fact, and they will therefore humbly advise Her Majesty to affirm the decision under appeal, and to dismiss this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

1879 *April* 22*nd*.

No. 1685 of 1878.

RAJENDER NATH ROY . . . (DEFENDANT) APPELLANT

AND

S. M. RANEE PUTTO SOONDERY DASSEE . . . . . (PLAINTIFF) RESPONDENT

Maintenance, Suit for, by Hindu Widow—Re-adjustment of Maintenance

A suit brought by a widow, against the adopted son of her husban for possession of her husband's estates, was compromised in tl terms of a solenamah under which the defendant agreed to pay to tl plaintiff a certain sum for maintenance, the same to be secured b assignment of the rents payable by certain ryots. Subsequently, tl holding, the rents of which were assigned, having become unfit f cultivation by reason of an inundation of salt water, and the defenda himself having become greatly impoverished by his estate having bee injured by the same cause, the amount due for maintenance was n paid, and the widow brought a suit to recover that amount.

Held that, inasmuch as the amount of maintenance must be take to have been fixed with reference to the extent and value of th property, the Court had power to re-consider the allowance and to r adjust it to the altered circumstances.

APPEAL from a decision passed by the Judge of the 24 Pergunnahs, modifying the decree of the Additional Subordinat Judge of that district.

The plaintiff in this case, it appears, had in 1869 instituted a suit against the defendant, Rajah Rajender Nath Roy, the adopted son of her husband, for possession with mesne profits of the estates left by her husband valuing her claim at Rs. 61,921. This suit was, however, amicably settled, the defendant by a solenamah having agreed on the 29th December 1869 to pay to the plaintiff the sum of Rs. 264 and 3 bish of paddy annually for her maintenance.

It was provided by the solenamah that the money and paddy should be realized by the plaintiff from certain tenants of the zemindari to whom the defendant assigned over the paymen of the amount fixed for maintenance.

1879

RAJENDRA NATH ROY v. S. M. RANEE PUTTO SOONDERY DASSEE.

One of the tenants, who was to pay Rs. 84 and 3 bish of paddy, absconded, the lands held by him having become unfit for cultivation by an inundation of salt water.

The plaintiff now sued to recover Rs. 84 and the 3 bish of paddy, and also further arrears of maintenance.

It was found, as alleged by the defendant, that the entire estates left by the plaintiff's husband had been flooded by salt water, and that the tenants had deserted their holdings, in consequence of which circumstances the income of the defendant had been so diminished that he was unable even to pay Government Revenue, and had become deeply involved in debt.

Judgment.

It was also found that the plaintiff was in receipt of Rs 15 per mensem for maintenance.

The Subordinate Judge held that, considering the impoverished state of the estate, the amount of maintenance agreed upon under the solenamah should be modified to meet the existing circumstances of the estate, and that Rs. 15, the amount of which she was then in receipt, was sufficient.

The District Judge, to whom the plaintiff appealed, considered the terms of the solenamah were binding, and gave the plaintiff a decree for the amount claimed.

The defendant thereupon preferred the present appeal to the High Court, on the ground that the lower Court ought to have taken into consideration the altered condition of the estate and of the defendant's means.

Baboo *Nil Madhab Bose*, and Baboo *Jadub Chunder Seal*, for Appellant.

Baboo *Rash Behary Ghose*, and Baboo *Obinash Chunder Banerjee*, for Respondent.

The judgment of the Court (1), which was as follows, was delivered by

JACKSON, *J.* :— JACKSON, *J.*

It appears to us that the Judge of the lower Appellate Court has taken an erroneous view of the defendant's liability

(1) JACKSON and MCDONELL, *J.J.*

1879

RAJENDER NATH ROY v. S. M. RANEE PUTTO SOONDERY DASSEE.

Judgment.

JACKSON, J.

in this matter. The previous decree based upon a compromise awarding a specific sum by way of maintenance, and the particular mode of realizing that sum has neither more nor less effect than a decree would have if it were founded upon a judgment of Court arrived at after hearing evidence. Such decrees apportion maintenance always with reference to the circumstances of the parties, to the reasonable wants of the widow, and the extent of the property out of which the maintenance is to come. So long as the circumstances remain unaltered, the maintenance of course will be paid at the rate agreed upon, but if by circumstances not arising out of the default of the holder of the property the assets of it are greatly reduced so that he can no longer be reasonably called upon to pay the amount of maintenance fixed, I think it is open to the Court to re-consider the allowance and to adjust it to the altered circumstances.

From this point of view, I think the Subordinate Judge was right in giving the plaintiff a decree only to the amount which she was then receiving, and the lower Appellate Court was in error in regarding the arrangement as an immutable contract. There is no reason suggested to us for supposing the state of facts found by the Court of First Instance otherwise than correct, and regard being had to the impoverished state of the family, which is evident, we think the ends of justice do not require that we should make any further remand, but that we should set aside the judgment of the lower Appellate Court, and restore that of the Subordinate Judge with costs of this appeal.

[CRIMINAL REFERENCE.]

ABDUR RAHMAN *vs.* SAKHINA.

1879
Augt. 13*th.*

SOBHAN *vs.* SHUBRATUN.

No. 178 of
1879.

EUSUFF *vs.* SHAMA.

Presidency Magistrates Act (IV of 1877), sections 234, 235, Powers of Magistrates under—Maintenance, Stay of Order for—Divorce under Mahomedan Law, Effect of.

A Presidency Magistrate is competent to stay the operation of an order made under section 234 of Act IV of 1877, for maintenance of a wife, and to refuse to issue his warrant under the 3rd clause of that section, although he cannot formally cancel the order which must be taken to have been a proper and legal order when it was made; and he is competent to try all questions which affect the rights of a woman to receive maintenance.

For the purposes of Chapter XVIII of Act IV of 1877, a Magistrate must, when a question of divorce arises, determine on such evidence as may be before him, whether there has or has not been a legally valid divorce.

REFERENCE under section 240 of the Presidency Magistrates Act (IV of 1877).

In this case three Mahomedans sought to set aside an order made by Mr. Amir Ali, Officiating Chief Presidency Magistrate, giving their wives maintenance on the ground that since the order was made they had each divorced their wives.

The Chief Magistrate, to whom the applications were originally made, had the matter argued before himself and Mr. Souttar, the Presidency Magistrate of the Southern Division.

The result was, that both agreed in dismissing the application, subject to the opinion of the High Court upon the points stated in the following reference:—

"Several applications have been made to us recently for setting aside certain orders made by us under section 234 of Act IV of 1877 (Presidency Magistrates Act), on the ground that since the

1879

ABDUR RAHMAN v. SAKHINA.

Statement.

date of these orders the petitioners have divorced their wives, in whose favor such orders were made. The practice in these Courts has hitherto been to dismiss such applications summarily, but in view of the importance of the question involved we allowed the parties to argue the points before us. The applications are made under section 235 of the Act, which provides that, on proof of an alteration in the circumstances of the parties, the Magistrate may alter the amount ordered. Looking to the wording of this section, and taking it in connection with section 30 of Act IV (B.C.) of 1866, for which it is substituted, we have held that we had no power under that section to cancel our orders on the ground of divorce. It has been also contended before us that as the Mahomedan Law allowed a husband to divorce his wife, at any time and for any reason, the Magistrate's order cannot be enforced after the repudiation. In support of this contention two cases were cited: *Nepoor Aurut* vs. *Jurai*, 19 W. R., pp. 73 and 74, and *In re Kasam Pirbhai*, 8 Bom. H. C. R., C. C., 95, one of which, however, did not seem to us to decide the point definitely, and the ruling in 8 Bom. H. C. R. appeared to us to contemplate a case where the divorce was admitted, or where it had received the sanction of a Court of competent jurisdiction as to its validity. Considering the infinite forms of divorce recognised by the Mahomedan Law, each differing from the other in its legal consequences, and the difficulties which would arise if the Criminal Courts were to enter into such questions, we have held that we had no power to try the validity of a divorce, where the fact was disputed by the wife.

As the question, however, is one of considerable importance, and as we think it a fit case to refer to the High Court, we solicit the opinion of the Honorable Court on the following points:—

(1.) Whether the Presidency Magistrates have the power of cancelling, under section 235, orders made under section 234 on the ground of divorce.

(2.) When the fact of the divorce or its legality is disputed by the wife, whether the Criminal Courts have the power of trying the question."

1879

ABDUR RAHMAN v. SAKHINA.

Judgment.

The judgment of the Court (1) upon the reference was as follows :—

The questions referred to this Court are as follows :—

In our opinion a Magistrate is competent to stay the operation of an order for maintenance of a wife made under section 234, Act IV of 1877, and to refuse to issue his warrant under the 3rd clause of that section, although he cannot formally cancel the order, which must be taken to have been a legal and proper order when it was made, and he is competent to try all questions raised before him which affect the right of a woman to receive maintenance. This is the view taken by the Bombay High Court in the case cited in the reference (*In re Kasam Pirbhai and his wife Hirbhai*, 8 Bom. H. C. R., C. C., 95). The Court, in the exercise of its criminal jurisdiction, enquired into the fact and legality of the divorce there alleged, and having found that there had been a legal divorce, it declared that the Magistrate ought not to issue an attachment upon, or otherwise to execute the order, he being in fact *functus officio*.

The power of the Magistrate to act in this way does not, in our opinion, arise from the change in the provisions of section 13, Act IV (B.C.) of 1866, introduced by section 235, Act IV of 1877, and does not depend upon the expression "may make such alteration in the allowance ordered as he thinks fit." These words, read with the proviso which immediately follows them, "provided the monthly rate of Rs. 50 be not exceeded," and with the provisions of the earlier law, which only admitted of reduction of the amount ordered, and gave no authority to a Magistrate to increase such amount on proof of a favourable change of the circumstances of the person ordered to pay, seem to us to be intended only to vest in a Magistrate a power to revise any order of maintenance previously made on proof of change of circumstances, with a view to alter the amount to that which may be appropriate under the new circumstances.

It is not, we think, doubted by the learned Magistrates who have made this reference, that an order of dissolution of marriage under the Indian Divorce Act would put an end to the operation

(1) AINSLIE and MCDONELL, *JJ.*

1879

ABDUR RAHMAN v. SAKHINA.

Judgment.

of a Magistrate's order for maintenance, but they seem to draw a distinction between the case of persons subject to the Divorce Act, and Mahomedans, who can exercise the power of divorce at their own pleasure and without the intervention of any Court. This distinction cannot, in our opinion, be maintained. Whether the dissolution of the bond of marriage is capable of being effected in one way or in another, when once validly effected, it must operate to stop the operation of a Magistrate's order made in favor of a *wife*. With the cessation of the conjugal relation the responsibilities attaching thereto cease. It is only on proof of the existence of this relation (we have not now to deal with the case of children) that a Magistrate can make any order at all, and any order made is to be for a monthly allowance for the maintenance of a *wife*, and it is as *wife* that the woman is to continue to receive an allowance. The last clause of section 234, which is so worded as to apply either before or after an order for maintenance is made, shows that conduct inconsistent with her duties as *wife* will take away her right to receive it, even while the conjugal relation remains undissolved.

If a woman makes an application to a Magistrate for an order for maintenance against her husband, she must, if the relation of husband and wife is disputed, prove its existence. It may, perhaps, be admitted that there had been a marriage, but alleged that it has been dissolved. A Magistrate must of necessity enquire into the fact of marriage in the one case, and into the fact of dissolution of marriage in the other, and we find that in one of the cases referred, the learned Magistrate did try the plea of divorce. Unless the woman making the application is a wife he has no power to make an order of maintenance. In the case of alleged divorce the divorce must be proved, whether the parties are Christians or Mahomedans. The means of proof are different, but the mode of procedure, as far as the Magistrate is concerned, is the same. He is to determine on evidence whether the allegation of divorce is true. In the one case the only possible mode of divorce is by a decree of a competent Court, and the decree is conclusive as evidence. In the other a recourse to a Court is wholly unnecessary, and unless it should happen that the question has been already decided between the parties in a

1879

ABDUR RAHMAN v. SAKHINA.

Judgment.

:tent Court, the Magistrate must draw his own conclusions the oral and other evidence put before him as best he may. : fact that the power of divorce given by the Mahomedan nay be so exercised as to defeat the intention of the Legis- : as expressed in section 234, Act IV, 1877, and other simi- ıactments, may go to show that further legislation is requir- ıt it cannot affect the law as it stands. It has been said by arned pleader (who appeared before us on behalf of the ɔner to the Magistrates) that the right to exact payment of : immediately on dissolution of marriage is a sufficient check : abuse of that power; this, however, is not matter for pre- ɔnsideration.

our opinion it is, under the terms of section 234, as essen- o the continued operation as to the original making of an of maintenance that the recipient of the allowance should *wife* at the time for which maintenance is claimed, and quently for the purposes of Chapter XVIII of the Presidency ıtrates Act of 1877, a Magistrate must, when a question of ce arises, determine on such evidence as may be before him, her there has or has not been a legally valid divorce. If he that there has been a valid dissolution of the marriage tie, hould refrain from taking any steps to enforce the order of ıtenance from the date of such dissolution.

[CIVIL APPELLATE JURISDICTION.]

1879
April 11th.

No. 1278 of 1877.

SUMRUN THAKUR (DEFENDANT). . . . . APPELLANT;

AND

CHUNDERMUN MISSER AND OTHERS (PLAINTIFFS) . . . . . } RESPONDENTS.

Mitakshara—Joint Hindu Family—Suit to set aside sale in execution of decree obtained against a member of joint family—Auction-purchaser, Right of, to insist upon partition of joint estate.

In a suit by a member of a joint Mitakshara family, against an auction-purchaser of the rights and interests of such of the members of the family who had executed a mortgage bond as security for a loan, the auction-purchaser is entitled, as defendant, to insist upon a right to have the joint property partitioned as against the plaintiff, and to have apportioned to him the shares of the judgment-debtors.

Deendyal Lal vs. *Jugdeep Narain Singh*, 1 C. L. R., 49, and L. R., 4, I. A., 247, commented upon.

APPEAL from a decision passed by the Judge of Tirhoot, reversing the decree of the Second Subordinate Judge of that District.

This was a suit brought by one of the members of a joint Mitakshara family for the recovery of certain property which had been sold in execution of decrees obtained upon two bonds given by certain other members of the family to secure loans taken by them without the plaintiff's consent, and, as he alleged, without legal necessity and for immoral purposes.

The auction-purchaser and the other members of the joint family were made defendants.

The lower Court dismissed the suit on the ground that it had not been satisfactorily made out that the family was joint. On appeal the lower Appellate Court found that the family was joint at the time of the execution sale, and remanded the case to the lower Court to try the question whether the loans had been contracted under legal necessity for the benefit of the family. The question was found in the negative, and a decree was accordingly given, directing that the former decree and execution thereon

should be set aside; and that the plaintiff should be put in joint possession of the disputed property.

The auction-purchaser appealed against this decree.

Baboo *Chunder Madhub Ghose*, for Appellant.

Baboo *Gopal Lall Mitter*, for Respondents.

The judgment of the High Court (1) was as follows :—

This is a suit by a member of a joint family against the auction-purchaser of the rights and interests of the members of the family who executed a bond mortgaging their shares as security for a loan.

The auction-purchaser brought a suit on the bond, and having obtained a decree put the mortgaged property up for sale in execution thereof, and purchased it himself.

The lower Appellate Court has found as a fact that this family was joint, but this is not a matter of any material importance now, because the question of the rights of an auction-purchaser in such a case as this has been determined by a recent judgment of their Lordships of the Judicial Committee in Privy Council on the 25th of July 1877, reported in 1 C. L. R., 49—*Deendyal Lal* vs. *Jugdeep Narain Singh.* Their Lordships, while refraining from expressing any dissent from the decision of a Full Bench of this Court in the case of *Sadabart Prasad Sahu* vs. *Foolbash Kooer*, 13 B. L. R. (F.B.) 31, in respect of voluntary alienations, have determined that as regards sales in execution of decrees the rights and interests of a debtor in a joint family property may pass to an auction-purchaser, and that the auction-purchaser has a right to demand a partition of the interests so acquired by him.

This being so, it appears to us that if an auction-purchaser can as a plaintiff come into Court and demand a partition of the interests of the persons whose rights he has acquired, he is equally entitled as a defendant to set up that right of partition against a member of the joint family who seeks to reclaim the property which has come into his possession. In the case before the Privy Council the order that was made took a peculiar form; because, I apprehend, there was a peculiarity in that case. One

(1) AINSLIE and MCDONELL, *J.J.*

1879

SUMRUN THAKUR v. CHUNDERMUN MISSER.

Judgment.

of the members of the joint family had not been represent the suit, and therefore a final declaration as to the rights c several members of the family could not then be made it may be that their Lordships thought that it was unnec to re-open that particular case when the same question be as well tried in a separate suit by the auction-purc In this case, however, we think that, as the suit is to go b the first Court, there is no reason why a final adjudi should not be arrived at. The Court will ascertain fron parties, the persons who are admitted or said to have been bers of the joint family at the time of the execution sale; if all the members are already parties to the present sui Court will at once go on and determine any questions may arise between them. If any person, who is said to have entitled to any share at that time, is not on the record as a the Court will take proper steps to put him or her on the r It will then decide what shares would actually have con partition to the judgment-debtors had a partition taken pl the day of the sale; and the plaintiff's right to recover fro defendant will depend upon the amount of shares deterr If those shares amount to the whole 13 annas 6 gundas 2 cc 2 krants in the possession of the defendant, of course th will be dismissed, otherwise the plaintiff will be entitled cover proportionately.

The effect of this order will be to set aside the order o Subordinate Judge, dated the 7th of July 1877, and to re the case to the first Court to be disposed of with refere the above observations, and for an order in respect of the incurred in the Courts below.

The costs of this appeal will be paid by the respondent.

[CIVIL APPELLATE JURISDICTION.]

BISSEN DOSS SINGH (PLAINTIFF) . . . . APPELLANT;

AND

SHEO PROSAD SINGH AND OTHERS . . . . (DEFENDANTS) . . RESPONDENTS.

1879 *May 1st.*

No. 659 of 1878.

Mortgage—Mortgaged property, Purchase of, by first mortgagee—Priority.

If the first mortgagee purchases the property mortgaged after a second mortgage is created upon it, he does not thereby lose the benefit of his first mortgage if the money due under the first mortgage be set off against the consideration of the sale.

Accordingly, where a second mortgagee obtained a decree upon his mortgage subsequently to a sale of the mortgaged property to the first mortgagee, who had been allowed to set off the money due to him on his mortgage against the consideration, the latter is entitled as against the auction-purchaser at the sale in execution of the decree to priority in regard to his mortgage.

APPEAL from a decision passed by the District Judge of Tirhoot, affirming the decree of the Subordinate Judge of that District.

Baboo *Kally Kissen Sein*, for the Appellant.

Baboo *Rajendro Nath Bose*, and Baboo *Nagendro Nath Roy*, for the Respondents.

The facts are fully stated in the judgment of the Court (1), which was as follows :—

This suit is brought for a declaration of the plaintiff's right and confirmation of his possession with respect to two annas out of four annas of the entire sixteen annas of Mouzah Aktear-pore Kanti, on the strength of a deed of sale, dated the 11th September 1871, by setting aside the auction sale of the said share held on the 16th September 1875.

It appears that the whole of the four annas share mentioned above was the property of a minor Subha Narain Sahi. On the

(1) MITTER and TOTTENHAM, *J.J.*

1879

BISSEN DOSS SINGH v. SHEO PROSAD SINGH.

Judgment.

11th February 1865, Mussamut Luchu Koer, the defendant No. 5, as the mother and guardian of the minor, executed a zurpeshgee lease in favor of the plaintiff for the whole four annas share of this mouzah. Then, on the 6th September 1869, she, on behalf of the aforesaid minor, raised a further loan by a bond, executed also in favor of the plaintiff, in which bond two annas share of this mouzah was hypothecated. On the 20th September 1870, the defendant No 5, as guardian of the aforesaid minor, executed a bond in favor of the defendant No. 4, Surub Dewan Sing, hypothecating the whole four annas share of this mouzah. Surub Dewan Sing brought a suit upon this last-mentioned bond for the recovery of the money secured by it against the minor represented by his mother Luchu Koer, and obtained a decree on the 31st December 1873. The plaintiff in this case was not made a defendant in that suit. In execution of this decree of the 31st December 1873, the whole of the four annas share of the mouzah in question was sold and purchased by the defendants 1, 2, and 3. After this auction purchase the defendants 1, 2, and 3, took out processes for the delivery of possession, and thus threatened to disturb the plaintiff's possession in the two annas share, the subject matter of this suit. Under these circumstances, the plaintiff has brought this suit for the declaration and the relief mentioned above.

The plaintiff's purchase, zurpeshgee and bond referred to above, were impeached by the defendants, the auction-purchasers, as collusive, but the two Courts below have found all these transactions to be genuine and *bonâ fide*. The plaintiff's suit, however, has been dismissed by both the Courts below. The Subordinate Judge dismissed it because he was of opinion that the plaintiff having purchased this property on the 11th September 1871, after the mortgage in favor of Surub Dewan Sing, could not rely upon his previous zurpeshgee of the 11th February 1865, and the hypothecation of the 6th September 1869. The Subordinate Judge was also of opinion that, as the plaintiff did not save the property from auction sale by depositing the money due to Surub Dewan Sing, he had lost all his right to it. The District Judge in appeal has dismissed the plaintiff's claim simply upon the ground that upon the facts stated and proved

1879

BISSEN DOSS SINGH v. SHEO PROSAD SINGH.

Judgment.

the plaintiff is not entitled to a declaration that he is the absolute owner of the property. The District Judge is of opinion that the plaintiff's purchase of the 11th September 1871 was subject to the mortgage in favor of Surub Dewan, dated the 20th September 1870.

It has been contended in special appeal that, although this view of the District Judge is correct, yet the plaintiff in this suit is entitled to have the question of the relative rights of the parties determined and declared. It is also contended that at any rate the plaintiff is entitled to have his possession confirmed against the defendants.

We find that all the necessary issues that could possibly arise in the case regarding the relative rights of the parties were raised by the Court of First Instance. The parties, therefore, had full opportunity to adduce evidence bearing upon the questions embraced in those issues. That being so, we are of opinion that it may obviate unnecessary costs and litigation between the parties if their relative rights are declared and determined in this suit. At any rate the plaintiff is entitled to have the question, whether his possession should be confirmed or not, determined in this case.

Upon the facts found by the Courts below we think that the relative rights of the parties are as follows: The plaintiff purchased the share in question on the 11th September 1871, and the monies due under the zurpeshgee of the 11th February 1865, and the bond of the 6th September 1869, were set off against the consideration money. Previously, however, on the 20th September 1870, the property had been mortgaged to Surub Dewan, and therefore the plaintiff's purchase of the 11th September 1871 was subject to the charge created by the bond of the 20th September 1870. Then Surub Dewan obtained his decree only against the mortgagor.

The plaintiff was not made a party to that suit. In execution of that decree, therefore, what was sold and purchased was simply the right of the mortgagor. But the mortgagor's right had already passed to the plaintiff by his purchase of the 11th September 1870. That being so, it seems to us clear that the defendants, auction-purchasers, are simply now in the shoes of the mortgagee,

1879

BISSEN DOSS SINGH v. SHEO PROSAD SINGH.

Judgment.

Surub Dewan, and that they are not entitled to interfere with the possession of the plaintiff, supposing that that possession only commenced from the date of his purchase which was made on the 11th September 1870. Therefore the plaintiff is entitled to have his possession confirmed.

Then, as regard the plaintiff's relative position as holder of charges upon the property now in question, it is now the settled law in this country that if the first mortgagee purchases the property mortgaged after a second mortgage is created upon it, he does not thereby lose the benefit of his first mortgage, if the money due under the first mortgage be set off against the consideration of the sale. That being so, the plaintiff in this case is entitled to priority as regards the zurpeshgee of the 11th February 1865, and the bond of the 6th September 1869. We think, therefore, that it should be declared that the plaintiff as against the defendants, auction-purchasers, is the holder of two prior charges created by the zurpeshgee of the 11th February 1865, and the bond of the 6th September 1869.

As the plaintiff in this case has failed to substantiate his allegation that he has become the absolute owner of the share in question, and that the defendants have no sort of right with reference to it, we think that each party should bear his and their own costs throughout the litigation in all the Courts.

[CIVIL APPELLATE JURISDICTION.]

GOPI MOHUN MOZOOMDAR (PLAINTIFF) . APPELLANT; 1879 *June 4th.*

AND

A. HILLS (DEFENDANT) . . . . . RESPONDENT. No. 1705 of 1878.

Enhancement of Rent of tenure, on ground of area being increased by alluvion —Permanent Settlement, Enhancement of lands not subject of—Regulation XI of 1825*—Government, Position of, under Rent Laws.*

Where the area of a tenure is increased by alluvion the proper remedy of the landlord is not to sue for enhancement of the rent under the Rent Laws, but, under section 4 of Regulation XI of 1825, to sue for an additional rent for the alluviated lands. Such additional rent cannot be considered as forming part of the rent of the original tenure.

In a suit for enhancement it is not necessary to show that the land, the rent of which it is sought to enhance, has been subject of permanent settlement. In such a suit, the Government, as against the ryots, is in no better position under the Rent Laws than other landlords. *Sadanundo Mytee* vs. *Nowrutton Mytee*, 16 W. R., 289 followed.

APPEAL from a decision of the District Judge of Moorshedabad, affirming the decree of the Moonsiff of Azimgunge.

Baboo *Rash Behary Ghose*, for Appellant.

Baboo *Bhowani Churn Dutt* (with him Baboo *Biprodass Mookerjee*), for Respondent.

The facts of the case are sufficiently set forth in the judgment of the Court (1) which was as follows :—

In this case the defendant holds a tenure direct from the Government; and the plaintiff is an ijaradar under Government of certain property including the defendant's tenure; and this suit is brought to enhance the rent of the tenure, upon the ground that the lands included in it comprehend a larger area than the quantity originally leased, namely, 16 beegahs.

The case came up on special appeal on a previous occasion, when it was remanded; and the question which the Court below

(1) GARTH, *C.J.*, and PEINSEP, *J.*

1879

GOPI MOHUN MOZOOMDAR v. HILLS.

Judgment.

had to decide upon the remand, was whether the defendar held the tenure at a fixed rent from the time of the perm settlement.

The Court below found, that for four and twenty years vious to the commencement of the suit, the defendant ha the land at the same rent, and there being no evidence o part of the ijaradar to rebut the presumption to which the dant was entitled upon that finding under section 4 of the Law, the Court below found in favor of the defendant, an missed the appeal, (the Moonsiff having also found in defendant's favor.)

The case has now come up before us a second time on s appeal; and the first point that has been raised is, that the peculiar circumstances of this case, the tenant wa entitled to the benefit of section 4 of the Rent Law, inasmu the land had never been permanently settled; that in fact i khas land of the Government; that the Government is not b by the provisions of the Rent Law; and that as the plaintiff ijaradar, would be in the same position as the Governmen defendant is not entitled as against him to the benefit of sect

In answer to this argument, we have been referred to a reported in 16 W. R., 289—*Sudanundo Mytee* vs. *Now Mytee*, decided by Mr. Justice KEMP and Mr. Justice EL STONE JACKSON, in which it was held, that it was not nece to prove in a case of this kind, that the land, the rent of is sought to be enhanced, had been the subject of perm settlement.

We quite agree with the learned Judges who decided that There is nothing in the Rent Law, as far as we can see, shows that it is intended that the Government should b better position than other landlords as against their ryots. Act apparently extends to all classes of ryottee tenures; a find no reason to suppose that ryots holding direct from Go ment are less entitled to the provisions of the Act tha ryots of any other landlord.

Then another point has been raised (which was not argu the Court below, although it was apparently taken befo case came up here on the first occasion on special appeal) na

1879

GOPI MOHUN MOZOOMDAR v. HILLS.

Judgment.

that the increase in the area of the tenure upon which the plaintiff relies as entitling him to enhance the rent, was occasioned by certain land being added to the tenure, in consequence of an alluvion.

It is said, that under section 4 of Regulation XI of 1825, those lands became *an increment to the tenure* in such sort that they must be considered as forming part of the original holding; and that therefore in this suit for enhancement, the Court was bound to assess an additional rent in respect of these alluviated lands.

The 4th section says that "when land is gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landholder, or as a subordinate tenure by any description of under-tenant." And then there is a proviso, that "the increment of land thus obtained shall not entitle the person in possession of the tenure to which the land may be annexed to an interest therein beyond that passed by him in the tenure which he was holding." And "that an under-tenant who is liable by his engagements or by established usage to an increase of rent for the land annexed to his tenure by alluvion, shall not (by reason of the right conferred by section 4) be considered exempt from the payment of any increase of rent to which he may be justly liable."

We think that if the plaintiff in this case was entitled to any thing by virtue of the provisions of this section, he was entitled to sue the defendant for an additional rent on account of the alluviated lands. But we do not see why this rent should be considered as forming part of the rent of the original tenure, or why the plaintiff's remedy in such a case should be by enhancing the rent of the original tenure under the provisions of the Act Law.

Those provisions appear to us to be quite inapplicable to such case, and we conceive that the plaintiff's proper remedy would be to make a settlement with the defendant for an increased rent in respect of the alluviated land, or if he fails to effect such a

1879

GOPI MOHUN MOOZUMDAR v. HILLS.

settlement, then by a suit properly framed for the purpose to obtain an assessment of additional rent through the assistance of the Court.

Judgment.

This view appears to us to be perfectly consistent with the stipulation in section 4 that the tenant shall hold the alluviated lands only during the continuance of his original tenure.

We think, therefore, that the suit was properly dismissed; and that the plaintiff must seek his remedy in some other form for the rent to which he claims to be entitled.

The appeal is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

June 26th.

Nos. 1582, 1986 and 2494 of 1879.

GONESH PANDEY (ONE OF THE DEFENDANTS) . . . . . APPELLANT;

AND

DABEE DOYAL SINGH AND OTHERS . . . . . (PLAINTIFFS) RESPONDENTS.

Joint Hindu Family (Mitakshara)—Execution of decree, Sale in—Purchaser, bonâ fide without notice, at Sale in execution of decree.

Although a purchaser at an execution sale can ordinarily get no greater rights than the rights of the person named as the debtor in the decree under which the sale is held, the effect of a sale in execution of a decree against a member of a joint Hindu family under Mitakshara law has been extended on the ground that members of such a family, other than the judgment-debtor, contesting a sale under a decree, when shown to be bound to pay the debt, for the realization of which the sale has been brought about, are in equity not entitled to relief against a *bonâ fide* purchaser without notice.

Where the property of a joint family is sold in execution of a decree against one of the members, a judgment-creditor, who was plaintiff, and at whose instance the sale in execution was held, cannot claim to be in the position of a third person purchasing *bonâ fide* without notice.

Gridhari Lall vs. *Kanto Lall* and *Muddun Thakoor* vs. *Kanto Lall*, L. R., 1 I. A., 321; *Deendyal Lall* vs. *Jugdeep Narain*, 1 C. L. R., 49, and L. R., 4 I. A., 247; and *Ram Sahai* vs. *Shoe Prosad Singh*, 4 C. L. R., 226, discussed.

APPEALS from a decree passed by the Subordinate Judge of Shahabad, dismissing the decree of the First Moonsiff of Arrah.

1879

GONESH PANDEY v. DABEE DOYAL SINGH.

Judgment.

Ir. *R. E. Twidale*, Moonshee *Mahomed Yusoof*, and Baboo *ly Kishen Sen*, for Appellant.

Baboo *Jodoo Nath Sahai*, for the Respondents.

The facts sufficiently appear from the following judgment of Court (1), which was delivered by

AINSLIE, *J.*

AINSLIE, *J.* :—

One Rashbehari Singh was the owner of a 5½ dams share a certain property, which he mortgaged on the 14th of y 1865 and 1st of February 1866, the entire 5½ dams ig included in each of the bonds which were executed avor of Joogun Lall. Joogun Lall brought a suit against and obtained a decree in the Small Cause Court of Arrah, ch was sent for execution to the Moonsiff of that place, and the sale which was held in his Court on the 12th of February 8, Ram Khelawan became the purchaser.

On the 28th of December 1868 Ram Khelawan sold back 2½ s to Rashbehari: and it is with these 2½ dams that we are r concerned.

On the 14th of February 1869 Rashbehari mortgaged these 2½ s to Bhagirut Narain Singh, who transferred his bond to esh Pandey, the appellant before us. Eventually Gonesh dey sued Rashbehari on this bond and got a decree, and in ution thereof, on the 1st of July 1871, bought this 2½ dams s of the debtor, and obtained possession in September of year.

The present suit is by the two sons of Rashbehari—Dabee l who is now of age, and Sheo Nundun, who is still a

[redacted] result of the proceedings in the Courts below has been to Sheo Nundun a one-third share of the whole property. suit has been a good deal complicated by the plaintiff's up with it a claim against Ram Khelawan, which, as is from the facts already stated, is totally distinct from im against Gonesh Pandey. Whatever may be the the plaintiff in respect of the transaction of 1865 and

(1) AINSLIE and BROUGHTON, *J.J.*

1879

GONESH PANDEY v. DABEE DOYAL SINGH.

Judgment.

AINSLIE, J.

1866, it is clear that so far as the property returned into the hands of Rashbehari, the claim in respect of that portion must be founded on a different state of facts. It concerns a person between whom and Ram Khelawan there is no community of interest.

The Court below, when the suit was first brought, should have compelled the plaintiffs to elect which of the two suits they would proceed with, and not have allowed them to be mixed up as they have been.

The question in this case has been set at rest by decisions in the Privy Council. The result of those decisions may be stated generally to be that a decree must be taken to be limited strictly as operating against the persons named in it, and that only under certain special circumstances, where it is evident on the face of the proceedings that the person named in the decree must necessarily have been sued in a representative character, the Court may treat the decree as if the person represented had been named in it. It follows from this that a purchaser at an execution sale can ordinarily get no greater rights than the rights of the person named as the debtor in the decree under which the sale is held. But there are some peculiar cases, arising from the constitution of a joint Hindu family governed by the Mitakshara, in which the effect of an execution sale has been somewhat extended, and I think I may say that this has been done on the ground that members of the family other than the judgment-debtor contesting a sale under a decree, when shewn to be bound to pay the debt, for the realization of which the sale has been brought about, are in equity not entitled to relief against a *bonâ fide* purchaser without notice.

We have been referred to the cases by *Girdhari Lall* vs. *Kanto Lall*, and *Muddun Thakoor* vs. *Kanto Lall*, L. R., 1 I. A., 321. In the first case there was a private sale, and what was sold was the whole property, not merely the share of the father, but that which the father and son together were entitled to. In *Muddun Thakoor's* case it appears that the purchase was in execution of a decree which declared certain property to be liable to be sold. Their Lordships in the Privy Council held that the purchaser having no notice that the right to sell the property under the decree

1879

GONESH PANDEY v. DABEE DOYAL SINGH.

Judgment.

AINSLIE, J.

was contested, and it appearing on the face of the decree that the property was saleable under it, he was not bound to make any further enquiry, and was entitled to the property sold as a *bonâ fide* purchaser without notice, the property in both cases being such as would have been liable to be sold in the suit against the sons for the debt of their father.

In the subsequent case of *Deen Dyal Lall*, 1 C. L. R., 49, the judgment of their Lordships, as I understand it, turned upon this,—That there was in fact nothing that could be taken as a sale of the joint property of the family. In that case, although there was a mortgage and a decree based upon that mortgage, the property attached and sold was no part of the mortgaged property; and as there was no order for the sale of that property, the attachment could only, under the Procedure Code, be understood to be an attachment of the rights and interests of the judgment-debtor named.

In the case of *Ram Sahai* vs. *Sheo Prosad Singh*, 4 C. L. R., 226, the sale was held in the presence of the sons after the death of the father, and under a decree directing that the sum decreed should be realized by the sale of the mortgaged property. The sons were allowed to show, and succeeded in showing, that the debt was such that they could not be compelled to pay it, and on that ground, coupled with the fact that the purchaser had notice of their claim, they succeeded in recovering their shares of the property. The Privy Council, after referring to the case of *Kanto Lall*, used these words:—"This case, then, which is a decision of this tribunal, is undoubtedly an authority for these propositions: First, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and, secondly, the purchasers, at the execution sale, being strangers to suit, if they have not notice that the debts were so contracted,

1879

GONESH PANDEY v. DARBE DOYAL SINGH.

Judgment.

AINSLIE, *J.*

are not bound to make enquiry beyond what appears on the face of the proceedings." The words "has passed out of a joint family" must be taken as explained by the case of *Deen Dyal Lall*. They do not refer merely to passing of possession under colour of a sale; but passing of title where the intention has been to pass to the whole interest of a joint family, whether by private conveyance or by proceedings in execution of decree.

In the present case the decree obtained by Gonesh Pandey has not been produced, but the sale certificate, which is on the record, shows very clearly that it was a share consisting of the rights of Rashbehari Singh that was attached, and that the purchase was of that share. Although the suit was brought on a mortgage bond, the order which is at the end of the judgment does not show that it was the intention of the Court to direct the sale of the mortgaged property: if it was the intention of the plaintiff to get such an order for sale, he was bound to see that the decree was properly drawn up. In the absence of the decree we cannot assume from the order that the decree declared the right of the plaintiff to sell the whole of the property as mortgaged. But even if the decree were a decree for the sale of the property, Gonesh Pandey being the plaintiff in that suit and the judgment-creditor at whose instance the sale was held, cannot claim to be in the position of a third person purchasing *bonâ fide* without notice. If it was his intention to charge not only Rashbehari, but all the members of the family who under the Mitakshara rules would have joint interest with him in the property, he was bound to frame his suit properly; and he at least must have known that the suit was not so framed. Therefore he cannot claim to be treated as a *bonâ fide* purchaser without notice.

The date of the birth of the sons of Rashbehari has not been stated, but it is, as I understand, admitted, and the case has been argued on the footing that they were born before the mortgage of May 1865.

(The learned Judge then dealt with the other two appeals, Nos. 1986 and 2494.)

The result of the three appeals is, that in lieu of the decree of the Court below there will be a decree dismissing the suit of both the plaintiffs entirely as against Ram Khelawan in respect of 8

1879

GONESH PANDEY v. DABEE DOYAL SINGH.

Judgment.

AINSLIE, *J.*

dams, and decreeing their suit as against Gonesh Pandey in respect of ⅔ of 2½ dams.

As to costs in the Court below Ram Khelawan will be entitled to full costs calculated as if the suit had been brought separately against him to recover 3 dams, and the plaintiffs will be entitled to costs calculated on ⅔ of the value of their claim against Gonesh Pandey in respect of 2½ dams.

In this Court costs will be recovered by Sheo Nundun from Gonesh Pandey in appeal No. 1582, by Ram Khelawan from both the plaintiffs in appeal No. 1986, and by Dabee Doyal from Gonesh Pandey in appeal No. 2494.

[CIVIL APPELLATE JURISDICTION.]

July 8th.

No. 1340 of 1877.

AKUL GAZEE . . . . . (PLAINTIFF) APPELLANT;

AND

AMEENOODDEEN . . . . . (DEFENDANT) RESPONDENT.

Enhancement of Rent—Prevailing rate of Rent—Equitable Rate.

In a suit for enhancement of rent on the ground that the defendant pays at a lower rate than that paid by the neighbouring ryots of the same class for similar lands, if it be found that the prevailing rate is higher than the rent paid by the defendant, though lower than the rate claimed in the plaint to be the prevailing rate, the Court ought to give a decree at the actual rate found to be paid by the neighbouring ryots.

APPEAL from a decision of the Officiating Judge of Tipperah, reversing the decree of the Second Sudder Moonsiff of that District.

This was one of five suits, two of which were tried by the Second, and three by the third Moonsiff of Tipperah, brought by the plaintiff for enhancement of rent of lands belonging to a particular mouzah. The grounds upon which it was sought to enhance the rent was the same in each case, namely, that the rent paid by the ryot was below the prevailing rate payable by same class of ryots for lands in the neighbourhood of similar description and with similar advantages.

1879

AKUL GAZEE v. AMEEN-OODEEN.

Judgment.

The plaintiff claimed in each suit Rs. 2 per kani as being the prevailing rate. In the present case the defendant had been holding 2 drones of land at a rent of Rs. 25. The plaintiff did not produce the jamma-wasil-baki papers, but from a terij of a durijaradar of the disputed mouzah it appeared that ten ryots were paying Re. 1-8 and upwards, and six witnesses, who were called by the plaintiff, proved that they themselves were paying not less than Re. 1-8. The defendant also in the present case admitted that during his dur-ijara Re. 1-4 and Re. 1-8 had been the rates. The second Moonsiff on that evidence in this and the other case tried by him, was of opinion that Re. 1-8 per kani was a "fair equitable rate for the defendants," and gave a decree for enhancement at that rate. The third Moonsiff, in the three cases tried by him, gave a decree for Rs. 1-10 per kani instead of for Rs. 2 as claimed.

On appeal the District Judge reversed the decision of the Moonsiff, on the ground that he was bound to find, not what he considered a fair and equitable rate, but what was actually the prevailing rate, and if that were less than the rate claimed, to dismiss the suit.

The plaintiff thereupon preferred a second appeal to the High Court.

Moonshee *Serajul Islam*, for the Appellant.

Baboo *Bussunt Kumar Bose*, for the Respondent.

The judgment of the High Court (1) was as follows:—

The Judge has dismissed the suit of the plaintiff, which is a suit for enhancement of rent, on grounds that appear to us to be erroneous. The Judge holds that because the evidence adduced by the plaintiff does not prove that the prevailing rate is Rs. 2 per kani, which is the rate claimed by him, therefore he, the plaintiff, cannot get a decree for enhancement at a lesser rate. This proposition is not supported by the ruling in the case of *Belaram Kotal* vs. *Nund Coomar Chuttoram*, reported in 6 W. R., Act X R. 45, to which he refers. The evidence which was adduced before the Moonsiff, and which the Judge has not

(1) MORRIS and PRINSEP, *J.J.*

1879

AKUL GAZEE v. AMEEN-OODEEN.

Judgment.

disbelieved, shows that Re 1-8 per kani may fairly be considered and held to be the prevailing rate in the village. It is not because the plaintiff failed to produce the jamma-wasil-baki papers to prove this point that his case should be thrown out altogether, inasmuch as the information which would be thus furnished is fully supplied by the terij papers of the late ijaradar. In this view we think that the Moonsiff was right to give a decree at the lower rate of Re 1-8 per kani, and the reason assigned by the Judge for not giving a decree for enhancement at a rate lower than that claimed by the plaintiff not being good in law, we set aside the order of the Judge and restore that of the first Court with costs.

[CIVIL APPELLATE JURISDICTION.]

July 24th.

No. 157 of 1879.

KRISTO LAL GHOSE . . . . (DEFENDANT) APPELLANT;

AND

BONOMALI RUJ AND ANOTHER . (PLAINTIFFS) RESPONDENTS.

Registration—Bond unregistered how far admissible in evidence.

Plaintiff sued upon a document in the nature of a bond, by which the defendant agreed to repay to the former, with interest, a certain loan advanced, it being further provided by the bond that, as collateral security for the loan, certain immoveable property should remain hypothecated. The document was not registered.

Held, that, although by reason of non-registration the document would not be operative as regards the hypothecation, it was admissible in evidence to prove that the defendant was liable for the loan advanced under it.

Luchmiput Singh Dugar vs. *Mirza Khairat Ali*, 4 B. L. R. (F.B.), 18, followed; *Sreemutty Matonginy Dossee* vs. *Ramnarain Sadkhan*, 2 C. L. R., 428, distinguished.

APPEAL from the decision of the Subordinate Judge of [illegible]eerbhoom, affirming the decree of the Sudder Moonsiff of that [illegible]istrict.

The plaintiffs in this case sued upon two bonds, one for 56-12, and the other for Rs. 599, given to secure certain [illegible]s to the defendant.

1879

KRISTO LAL GHOSE v. BONOMALI RUJ.

Judgment.

The second document, which was partly in the form of a personal bond, declared certain immoveable property to be hypothecated by way of collateral security for the advances. This bond was not registered.

The lower Courts gave the plaintiffs a decree for the amount claimed with interest.

The defendant appealed to the High Court, on the ground that the second bond, by reason of its not having been registered, was inadmissible in evidence.

Baboo *Taruck Nath Sen*, for the Appellant.

Baboo *Sreenath Dass*, for the Respondents.

The judgement of the High Court (1), which was as follows, was delivered by

MITTER, *J.* MITTER, *J.*:—

We do not see any reason for interference in this case.

The only point that we need notice is, that one of the bonds filed by the plaintiffs, viz., the bond for Rs. 655-12, not having been registered, was not admissible in evidence. This bond is dated the 8th Joisto 1283. In support of this contention a case, decided by this Court, reported in 2 C. L. R., p. 428—*Sreemutty Matonginy Dossee* vs. *Ramnarain Sadkhan*, has been cited. It appears to us that that case is quite distinguishable. On the other hand the present case seems to us to be governed by the Full Bench decision—*Luchmiput Singh Dugar* vs. *Mirza Khairat Ali*, 4 B.L. R., 18, referred to in the case cited before us, and which was distinguished by the learned Judges who passed it from the case which was then before them. The distinction between this case and the Full Bench decision, referred to above, and the case cited before us is, as shewn by the learned Judges, that where the transaction is indivisible, and the registration of the document evidencing that transaction is compulsory, there the document is not admissible in evidence if it is not registered, but where the transaction is divisible the same strict rule does not apply. For example in this case the document upon which the plainti

(1) MITTER and TOTTENHAM, *J.J.*

1879

KRISTO LAL GHOSE v. BONOMALI RUJ.

Judgment.

MITTER, J.

rely is in the nature of a bond by which the defendant agreed to pay a certain sum of money with interest to the plaintiffs. It further provides that as collateral security for the loan advanced a certain property should remain hypothecated. This document, for want of registration, would not be operative as regards the hypothecation, but it is admissible in evidence to prove that the defendant was liable for the loan advanced under it.

For these reasons, we are of opinion that there is no force in this contention. The appeal must, therefore, be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

July 14th.

No. 1076 of 1876.

ROY NUND LALL BOSE AND ANOTHER (PLAINTIFFS) . . . . . APPELLANTS;

AND

MIR ABU SYED AND OTHERS (DEFENDANTS) . RESPONDENTS.

Execution of Decree, Question relating to—Joinder of Causes of Action—Limitation—Act IX of 1871, *Schedule II, Art.* 118—*Act XV of* 1877, *Schedule II, Art.* 120.

The plaintiffs, who were the heirs of R, on the death of his widow, brought a suit to set aside a mocurrari created by her, and to recover possession of the lands leased under the mocurrari, and obtained a decree in June 1873. Subsequently, on delivery of possession being given, the plaintiffs discovered that portion of the lands had been taken by the Government for public purposes, and that a sum of money awarded by way of compensation had been withdrawn from the Treasury by the defendants in March 1872. In September 1875, they brought a second suit to recover this sum. It was dismissed by the Court of First Instance on the ground that it was barred by section 7 of Act VIII of 1859, and again on appeal by the lower Appellate Court on the ground that the point to be decided was a question "relating to the execution of a decree" and ought to be determined by the Court which executed the decree.

Held, that the suit was not barred by section 7 of Act VIII of 1859, inasmuch there was no cause of action in respect of the compensation

1879

ROY NUND LALL BOSE v. MIR ABU SYED.

Statement.

money at the time of bringing the first suit, and also that the question to be decided did not relate to the execution of a decree.

Held, further, that the period of limitation applicable to the suit was six years from the date of the cause of action, as provided by Art. 118 of Act IX of 1871, (corresponding with Art, 120 of Act XV of 1877.)

APPEAL against a decision of the Judge of Gya, affirming the decree of the Subordinate Judge of that District.

The facts of this case are as follows:—One Moti Sunderi Dasi, who held a widow's estate in her deceased husband's estate, granted a mocurrari of the lands so held by her to the defendants.

On her death the plaintiffs brought a suit in October 1871, to set aside the mocurrari and to recover the lands, and obtained a decree on the 30th of June 1873. This decree was confirmed by the High Court on the 16th October 1874. It was discovered by the plaintiffs in 1873, when delivery of possession was being made to them, that portion of the lands had been taken over by the Government for the purpose of making a public canal, and that a sum of money paid by the Government by way of compensation for the land so taken had been withdrawn from the Treasury where it had been deposited by the defendants, in March 1872, *i.e.*, subsequently to the institution of the suit.

To recover this sum the plaintiffs filed the present suit on the 13th September 1875.

The Subordinate Judge dismissed the suit on the ground that a claim for the compensation money ought to have been joined in the former suit.

The plaintiffs appealed to the District Judge, but the appeal was dismissed, the Judge being of opinion that the question was one "relating to the execution of a decree," and should have been decided in the execution department.

Against this order of dismissal the plaintiffs preferred a second appeal to the High Court.

Baboo *Chunder Madhub Ghose*, and Baboo *Rajendronath Bose*, for the Appellants.

Mr. *R. E. Twidale*, for the Respondents.

udgment of the Court (1) was delivered by

, *J.* :—

pears to us that in this case the decisions of the lower ıre erroneous, and must be set aside, and that the plaintiffs :led to a decree for the amount claimed.

laintiffs are the heirs of one Russick Lall Mitter. When te left by him was in the possession of his widow Moti certain mouzahs appertaining to that estate were given rrari by her to the defendants in this case. A portion of ouzahs having been taken by Government for public pur- certain amount of compensation money was in deposit ollector's Court in lieu of the lands thus taken. On underi's death a suit was brought on the 7th October 7 the plaintiffs against the defendants, for the reversal of :urrari pottah and for possession of the lands covered by tah. The lands which were taken by Government, the ıation money of which was in deposit, appear to have :luded in that suit, the plaintiffs being ignorant of the fact ›se lands had been taken by Government for public pur- That suit was decreed on the 30th June 1873 in favor of intiffs. In the meantime, that is to say some time in 1872, the whole amount of the compensation money which leposit in the Collector's Court was taken by the defend- this case. The present suit was brought on the 13th ber 1875 by the plaintiffs to recover from the defendants ıount with interest from the date on which it was taken he Collector's hands.

lefendants resisted the claim, principally upon the ground e plaintiffs' claim was barred by limitation, and that the liable to be dismissed under section 7 of Act VIII of Although in the 7th para. of the written statement the stated that they were entitled to this money, it appears clear that the effect of the final decision of the 30th , between the parties was to declare that the plaintiffs' ct of this money was superior to that of the defend-

(1) MITTER and TOTTENHAM, *J.J.*

1879

ROY NUND LALL BOSE v. MIR ABU SYED.

Judgment.

MITTER, J.

The Subordinate Judge dismissed the plaintiff's claim under section 7 of Act VIII of 1859. On appeal by the plaintiffs the District Judge overruled that objection. He was also of opinion that the plaintiffs' claim was not barred by limitation, the law applicable to the claim being that laid down in Article 118 of the second schedule of the Limitation Act of 1871. But the District Judge has dismissed the suit upon the ground that the matter now in issue should have been raised and determined by the Court which had the charge of executing the decree of the 30th June 1873. He seems to be of opinion that the question at issue in this case is one which relates to the execution of that decree.

We are clearly of opinion that the ground upon which the District Judge has dismissed the suit is erroneous. The decree, which the plaintiffs obtained on the 30th June 1873 against the defendants, was a decree for land. There was no decree for the recovery of the compensation money, which is the subject-matter of this suit, and which in fact was drawn from the Collector's Court after the institution of the former suit. The question at issue in this case is not one which relates to the execution of the decree passed in that suit on the 30th June 1873. Therefore, it is quite clear to us that the order of the District Judge dismissing the plaintiffs' suit cannot be sustained upon the ground upon which he has put his decision.

But the defendants, respondents, have agreed before us that the District Judge's decision with reference to the questions of limitation, and the bar under section 7 of Act VIII of 1859, is erroneous. It is contended that the article of the Limitation Act which is applicable to this case is article 60, which runs thus:—"For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use." In this case it cannot be said that the money, which was taken out by the defendants from the Collector's hands, was so taken out for the plaintiff's use. We are, therefore, of opinion that this article does not apply, and there being no other article in the second schedule of that Limitation Act which is applicable to the facts of this case, it seems to us that the plaintiffs are entitled to maintain this suit within six years from the date of the cause of action under article 118 of that schedule, and that

consequently the decision of the District Judge upon the question of limitation is correct.

As regards the objection under section 7 of Act VIII of 1859, it appears to us that the defendants have not been able to show that at the time when the first suit was brought, that is to say, on the 7th October 1871, the plaintiffs had any cause of action in respect of this money as against them. That being so, and it being also admitted that the money was really drawn from the Collector's Office after the institution of that suit, we do not think that there is any force in this objection.

These are all the objections taken by the defendants to the plaintiffs' claim, and as it appears to us that the title of the plaintiffs in respect of this money cannot now be disputed, the plaintiffs are entitled to a decree. We accordingly reverse the decrees of the lower Courts, and direct that a decree be given to the plaintiffs for the money claimed with costs in all the Courts.

[CIVIL APPELLATE JURISDICTION.]

July 8th.

No. 209 of 1877.

MUDUN MOHUN SHAHA AND ANOTHER . . . . . } (DEFENDANTS) APPELLANTS;

AND

ANUNDMOYI (PLAINTIFF) . . . . . RESPONDENT).

Suit by Reversioners—Life Tenant, Alienation by—Waste—Right to sue for possession.

Plaintiff, who was the reversioner of her father's estate, sued, during the lifetime of her mother who held a life estate as widow of her husband, for possession of such estate on the ground that her mother had, without reason, alienated the whole estate with a few slight exceptions, absolutely to certain persons, who had again re-sold portions thereof. The defendants pleaded that the suit would not lie in the lifetime of the plaintiff's mother. It was found that the alienations were not fraudulent.

Held, that the plaintiff was not entitled to have possession of the property delivered to her, inasmuch as the alienation did not amount to a total destruction of the benefit derivable from the right of succession, and could not therefore be called waste, but that she was entitled only to a declaration that the alienation made by the widow and the subsequent alienations by her alienees should not affect or prejudice the plaintiff reversioner's interests beyond the lifetime of the widow.

1879

MUDUN MOHUN SHAHA v. ANUNDMOYI.

Statement.

REGULAR APPEAL from a decision passed by the Second Subordinate Judge of Tipperah.

In this case the plaintiff sued as next heir of her father, the late Kala Chand Shaha, to be put in possession of his eight annas share in certain specified properties on the ground of waste. She alleged that her mother Subadra, the widow of Kala Chand Shaha, who is still alive, and in whom these properties vested on Kala Chand's death, had by means of an arbitration award made in the terms of a certain deed of compromise, and put in force by a consent decree of Court, alienated the properties left by her father, with some petty exceptions, to Mudun Mohun and Huri Mohun, the two sons of Kala Chand's brother Gour Mohun, who were made defendants with Subadra; and, further, that they again had under various deeds of conveyance sold a large portion of properties to certain other persons who were also made defendants. She further declared that the arbitration award, compromise, and decree had been effected by the nephews in collusion with her mother Subadra, and in fraud of the rights of herself and of her infant son, the reversionary heirs. In the arbitration award it was recited that Kala Chand Shaha had, shortly before his death in 1260, when about to proceed on a pilgrimage to Brindabun, made over all his property to Gour Mohun upon condition that he should pay off all his debts, maintain Subadra, and defray the marriage expenses of his infant daughter (the plaintiff in the present suit.) It was further alleged that all the conditions had been carried out. In terms of this award a consent decree was, on 2nd Magh 1275, entered by the Court in a suit which had been brought by the widow of Kala Chand Shaha against the sons of Gour Mohun, who had died in the meantime. This suit, which was ostensibly instituted for the purpose of recovering the estate of her husband, the present plaintiff alleged to have been collusive. She was not a consenting party to the decree, having been an infant at the time.

In his written statement, Mudun Mohun traversed these allegations of the plaintiff. He denied the right of the plaintiff to bring the suit during the lifetime of her mother. He declared that Subadra never had been since the death of Kala Chand Shaha

in 1260, in possession of his share of the property, and that therefore the plaintiff's suit was barred by limitation. He moreover set up an independent title in himself and his brother in these terms: "The plaintiff's father Kala Chand Shaha at the time of his departure for Brindabun, giving up worldly cares and despairing of his life, bestowed upon his younger brother, my father, Gour Mohun Shaha, under a verbal gift and arrangement, the right of ownership of our entire estate, inclusive of debts due to and by the estate, by giving him the charge of maintaining, according to previous arrangements made in respect of our estate, the mother of the plaintiff and supplying her with food and raiment and giving her daughter, the plaintiff, in marriage by payment of the expenses necessary for the celebration of the rite in case the plaintiff's mother lived jointly with them." He then went on to say that the plaintiff's mother had quarrelled with him and his brother on this subject, the result being that the matter was referred to arbitration, and that to this arbitration the plaintiff, whom he alleged to have been of age, was equally with her mother a consenting party.

The Subordinate Judge who tried this suit held: 1*st*, that the plaintiff as reversioner could, during the lifetime of her mother, bring this suit; 2*nd*, that Subadra was in possession of the share of her husband's estate till 1275, the date of the arbitration award, when the family ceased to be joint, and that limitation did not bar the suit; 3*rd*, that plaintiff was not of age at the time of the arbitration award, and was therefore not bound by it; 4*th*, that the compromise, which was the basis of the arbitration award, was a fraudulent proceeding to which no effect could be given; because the principal allegation on which it proceeded, viz., that Kala Chand Shaha just before his death made a verbal disposition of all his property in favor of his brother Gour Mohun Shaha, was proved by the evidence to be false.

He accordingly gave a decree in favor of the plaintiff, under which, as manager, she was to get possession of the half share of the immoveable properties, and Rs. 3,111 the value of moveable properties specified, and to render an account to the plaintiff, Subadra, every year in the month of Bhadro.

1879

MUDUN MOHUN SHAHA v. ANUNDMOYI.

Judgment.

Against this decision the present appeal has been preferred.

Baboo *Kally Mohun*, Baboo *Mohiny Mohun Roy*, and Baboo *Rajendro Nath Bose*, for the Appellants.

Baboo *Nullit Chunder Sein*, for the Respondent.

The judgment of the High Court (1), after stating the facts, proceeded as follows :—

On a careful consideration of the evidence, we think that the principal questions of fact, which arise in the case, must be decided, as the Subordinate Judge has decided them, against the defendants. The depositions of two very respectable witnesses, Brij Mohun Adhikari and Gour Shaha, leave no doubt—1*st*, that previous to his departure for Brindabun, Kala Chand made no arrangement, either by word of mouth or in writing, by which he made over his properties to his brother Gour Mohun, and disinherited his wife and daughter; 2*nd*, that at the time of Kala Chand's departure, and death which followed close upon it, the plaintiff was only six or seven months old, and that consequently she was a minor when the arbitration took place in 1275; and, 3*rd*, that up to the date of the arbitration award Subadra was in the enjoyment and possession of her husband's share of the properties jointly with Gour Mohun, and after him his sons. We may add with reference to the argument that the plaintiff is bound by the arbitration award, that she is clearly, by the very terms of the compromise on which it is based, no party to it. The arbitrators themselves confirm this. One of them, Brij Mohun Adhikari, uses these words: "Anundo (*i.e.*, plaintiff), being a minor, the arbitrators did not think it necessary to ask for her consent." The principal contention, however, that has been raised in this appeal is, that as between Subadra and the defendants Nos. 1 and 2, there was no fraud or collusion to the detriment of the rights of the plaintiffs, and that the suit, as being instituted by the plaintiff, who is only a contingent reversioner, and who has not been able to prove waste, ought to have been dismissed. Many authorities have been cited to show that this case of the plaintiff is distinguishable from those in which a Court of Equity

(1) MORRIS and PRINSEP, *JJ.*

might properly interfere to put a contingent reversioner into possession in supersession of the right of the widow. This is not a case where the widow has disqualified herself under the Hindu law by acts of unchastity or forfeiture of caste, and the like. The question is, whether Subadra, by her conduct in thus alienating the greater portion of her husband's estate, has not given the plaintiff, as next heir, reasonable ground for seeking relief in protection of her rights. The law, as expressed in various rulings of our Courts, appears to be—

1st.—That a decision of a Civil Court against the widow in respect of her husband's estate, in the absence of fraud and collusion between the parties, would be binding on the reversionary heirs;

2nd.—That adverse possession, without fraud or collusion for a period of twelve years during the lifetime of the widow, would bar the reversionary heirs; and

3rd.—That reversionary heirs presumptive, in order to prevent their rights from becoming barred by limitation, may, on giving satisfactory proof of waste on the part of the widow, be put into possession, and the argument that has been addressed to us goes to show that the case set up by the present plaintiff does not come under one or more of these heads so as to entitle her to the interposition of the Court. Putting aside for the moment the question of fraud and collusion, it cannot be said that there has been here any such order of Court against the widow as will bind the reversioners. The order of the Civil Court, dated August 5th, 1869, by which the award of the arbitrators was ordered to be executed, was not the result of an adjudication by the Court of the question at issue between the parties. It simply gave the authority of the Court to an enforcement of an arbitration award which again was the result of a private compromise between the parties. The words of Mr. Justice MARKBY, *in re Bidah Chand Baboo* vs. *Prosunno Coomaree Debia*, 20 W. R., p. 89, are quite in point; "what is binding is a decree of Court properly obtained, and not a mere agreement which the parties have entered into for their own purposes, and embodied in a decree drawn up by consent."

Again, though the defendants in this suit set up the plea of limitation, and claim to have been in adverse possession since the

1879

MUDUN MOHUN SHAHA v. ANUNDMOYI.

Judgment.

death of Kala Chand, yet the lower Court has found that this is not so, and we agree in that view. It was not till 1275, the date of the arbitration award, that the defendants took possession on their own account, and deprived the widow of all the properties which pertained to the share of her husband, save two dalans and a jote or tenure worth Rs. 4 per annum.

Then, in the matter of waste, the plaintiff contends that the alienation by her mother to the defendants, and their subsequent alienations by sale of a great portion of the properties to third parties, who are added as defendants to this suit, constitute undoubted waste. Her counsel refers to the somewhat similar case of *Gunesh Dutt* vs. *Mussamut Lall Muttee Kooer*, 17 W. R., 12. The Court there remarked, "Here is the separate estate of Chedee Lall wanting a representative; the legal representatives are, first, the widow for life, and after her the plaintiff and her son. The widow has not only failed to occupy and manage the estate, but has allowed some one else, claiming under a different title, to come in and take possession, and has, after a full show of opposition, abandoned her rights and left the hostile holders undisturbed. Indeed she has done more, for, so far as lay in her power, she has worked to support their title, and to defeat the reversioner's right. It is a case of waste of the widest kind. It is not mere deterioration of the property that is threatened, but a total destruction of all benefit derivable from the right of succession." It must, however, be observed that between the case of Gunesh Dutt and the present case, there is a wide distinction, and it is one which the lower Court has failed to notice. In the case of Gunesh Dutt, the widow of Chedee Lall never entered into possession at all, but after a faint show of claim allowed the defendants to enter upon an adverse title. Here, on the contrary, the Court has found that Kala Chand died in 1260, and that the widow remained in possession of his share till 1275 when, under a deed of compromise and arbitration award, she made over all her rights, with a few petty exceptions, to the defendants. This is a state of things which is not necessarily injurious to the rights of the reversioners. As very justly pointed out by Mr. Justice MACPHERSON in the Full Bench case of *Nobin Chunder Chuckerbutty* vs. *Issur Chunder Chuckerbutty*, 9 W. R., p. 505, "a very great differen

exists between the case immediately before us (that is, as he lower down in his judgment describes it, the case of the property having never reached the hands of the mother at all, having been throughout held adversely to her), and the case in which a mother has herself alienated property belonging to the estate which she has taken as heiress without sufficient reason for such alienation. In the latter case he proceeds to say: "The alienation is good as against her, and so far as her own life interest is concerned. Therefore in fact no cause of action necessarily arises at all with respect to her alienation so long as she lives." The result then seems to be that the alienation by the widow, in the present instance, does not amount to a total destruction of all benefit derivable from the right of succession, and cannot, in this sense, be characterized as waste. Nor is it easy to perceive how the alienation by the mother to her husband's nephews, and their subsequent alienation by sale of various parcels to third parties have caused waste in the sense of actual deterioration of the property; on the contrary, it may be presumed until the contrary is shown, that both the nephews and the other vendor the defendants have dealt with the property in such a way as to make the best of their bargain.

There remains the allegation of fraud and collusion between the widow and the defendants, sons of Gour Mohun, which the plaintiff sets up, and which the lower Court finds to be proved. Strictly speaking all that the lower Court finds established is, that the defendants over-reached the widow in inducing her to abandon her rights for a very inadequate consideration. There was nothing under hand in the negotiation. The widow knew what her rights were, for in her statement of claim before the arbitrators she filed a schedule of the properties valued at Rs. 15,460-11-3, and claimed her share. Her son-in-law, the present plaintiff's husband, represented her in the negotiation, and may fairly be supposed to have consulted her interests and endeavoured to secure for her the best terms. He might, and we think ought certainly to have appeared on the part of the plaintiff and explained, if he could, how and to what extent he had been over-reached or defrauded by the defendants. But though repeatedly summoned by the defendants, and again by the Court itself, he never appeared or offered

1879

MUDUN MOHUN SHAHA v. ANUNDMOYI.

Judgment.

any explanation. Under these circumstances we must take it that there were, as noted in the deed of compromise, heavy debts due on account of the joint trade of the two brothers, Kala Chand and Gour Mohun, and that these considerably reduced the value of the property. These debts are entered at Rs. 9,461-15, and if allowance be made for them, the inadequacy of the consideration offered to the widow is much reduced. At the same time, we consider that even upon the admitted balance the widow received considerably less than the value of her share, for the bond for Rs. 1,200 was evidently quite nominal. The conclusion to be drawn then is, that while on the one hand we acquit the widow of wantonly abandoning her rights and property, we must also at the same time acquit the defendants of practising a fraud upon her, or doing more than drive a hard bargain with her. What has happened is, that "the widow has," (in the language of Mr. Justice MACPHERSON already quoted,) herself alienated property belonging to the estate which she has taken as heiress without *sufficient reason* for making such alienation." The case, therefore, does not seem to be one of the exceptional character referred to by Sir B. PEACOCK, in his judgment in the Full Bench case of *Nobin Chunder Chuckerbutty*, already referred to, in which the reversionary heirs may ask the Court to have the estate reduced into their possession. Unless, to quote the words of the Judges of the Sudder Dewany in the case of *In re Goluck Moonee Dassee*, S. D. A., 1859, p. 210, the evidence tends inevitably to the conclusion that the heirs will be damnified if she be left in possession, the widow should not be divested of the possession of her husband's estate. Here, in our opinion, the reversionary heirs have not necessarily been damnified by the act of the widow, though no doubt her alienation to her husband's nephew, and again their alienation of parts of the estate to others, were sufficient to arouse her apprehensions, and justify her taking action in assertion of her rights. We think that the plaintiff is not entitled to get possession of the 8 annas of the properties which Subadra inherited from her husband Kala Chand even in the modified form expressed in the lower Court's decree, but only to a declaration that the alienation made by the widow in favor of Mudun Mohun Shaha and Hurro Mohun Shaha, defen-

1879

MUDUN MOHUN SHAHA. v. ANUNDMOYI.

Judgment.

dants, in terms of the deed of compromise, dated Magh 2nd, 1875, and arbitration award of the same date, and any subsequent alienations made on the footing of each arbitration award shall be limited to the life interest of Subadra, and shall not affect or prejudice the plaintiff reversioner's interest beyond Subadra's life. The decree of the lower Court, so far, therefore, as it declares that "the plaintiff do as manager get possession of a half share of the immoveable properties as well as Rs. 3,111, being the value of the moveable properties, aforesaid, from the defendants; that she, plaintiff must render an account to the defendant Subadra every year in the month of Bhadro," is modified, and in lieu thereof the plaintiff is declared entitled to a declaration of her right as reversioner as above expressed. The plaintiff is allowed her costs in this Court.

[CIVIL REFERENCE.]

July 1st.

G. DE ANGELIS AND ANOTHER . . . . . PLAINTIFFS;

AND

C. K. MAYAPA SETTY . . . . . DEFENDANT.

Damages, Assessment of, for non-performance of sub-contract.

Plaintiff, who had contracted to take the whole tonnage of a steamer from B. & Co. at Re. 1-4½ per bag, re-let part of the tonnage to the defendant, who agreed to ship 680 bags, paying freight at Re. 1-6 per bag from C. to T.

The defendant having failed to perform any part of his contract, the plaintiff sued to recover damages for the non-performance.

The ship never started on its intended voyage from C. to T., having been unable to obtain a cargo.

Held, that the plaintiff was entitled to recover as damages, a sum equivalent to the entire freight agreed to be paid by the defendant for 680 bags from C. to T. after deducting therefrom a proportionate part of the expenses of carriage which had been saved by reason of the ship not having performed the intended voyage.

PER CURIAM.—The damages payable by the defendant must depend upon his own contract with the plaintiff, and not upon the terms of the bargain which the plaintiff may have made with B. & Co.

FERENCE submitted to the High Court by the First Judge Calcutta Court of Small Causes.

plaintiffs sued to recover Rs. 935 as damages in respect failure of the defendant to ship certain rice on board the

1879

DE ANGELIS v. MAYAPA SETTY.

Statement.

S.S. "St. George." The circumstances out of which the su arose are as follows:—

On the 3rd September 1877 the plaintiffs received from Messr Borradaile, Schiller & Co. a document in the following term "Calcutta, 3rd September. To the Commanding Officer of t S.S. "St. George," for Calicut, Naracol or Tuticorin or Gal Sir,—Please to receive on board from Messrs. G. De Angelis & C the undermentioned goods, viz.:—A full and complete cargo grain at Re. 1-4½ annas per bag of two maunds for Calicu Naracol or Tuticorin, Re. 1-3½ annas for Galle. 2½ per cent.

(Sd.) BORRADAILE, SCHILLER & Co."

On the 11th September following the plaintiffs entered into contract with the defendant by which they agreed to sub-let portion of the steamer, and in terms of that contract gave him th following shipping order: "11th September. S.S. "St. George to arrive, bound for Tuticorin, C. K. Mayapa Setty: 680 ba of rice, paddy and oats excepted at the rate of rupee one an annas six (Re. 1-6) per bag of 2 bazar maunds; freight payab there on notice.

(Sd.) G. DE ANGELIS & Co.

The steamer arrived on the 8th October. On the 22nd Octob the plaintiffs gave notice to the defendant both verbally and l letter to ship at once, stating that they would hold him liab for the full amount of freight in case of non-shipment.

The defendants did not ship, and about the same time Messr Borradaile, Schiller & Co. became insolvent.

The market it appears had suddenly fallen, and the plaintif were unable to re-let the portion of the ship contracted for by th defendant.

They now sued to recover damages arising out of the defen ant's breach of contract, assessing them at the full amount freight payable on the 680 bags.

Up to the institution of the suit no claim had been ma by Messrs. Borradaile, Schiller & Co. or by the Official Assig against the plaintiffs in respect of their breach of their contract the 3rd September.

The Judge of the Small Cause Court gave a decree for the full amount claimed, contingent upon the opinion of the High Court as to what damages (if any) the plaintiffs were entitled.

Argument.

Branson, for the Plaintiffs.

Jackson and *Phillips*, for the Defendant.

Branson.—The plaintiffs were unable, on account of a sudden collapse of the market, to re-let the tonnage which had been taken by the defendant, and, in the words of section 73 of the Contract Act, had no means of "remedying the inconvenience caused by the non-performance of the contract." That section of the Contract Act lays down merely what is the law in England. There being no market the plaintiffs were unable to lessen the loss. They are therefore entitled to recover the whole amount claimed as damages—*Hinde* vs. *Liddell*, L. R. 10 Q. B., 255; Sedgwick on Damages, p. 259. In the case of *Bridge* vs. *Wain*, 1 Stark., 504, where the defendant sold certain goods warranted to be scarlet cuttings, but which were not scarlet cuttings, and therefore useless for the purpose for which they were required, the plaintiff was held to be entitled to damages to the whole amount which he would have received for the cuttings delivered in China as they were intended to have been had the defendant faithfully performed his contract.

Jackson.—The plaintiffs can only recover the difference between the price payable to Messrs. Borradaile, Schiller & Co., and the price payable under the contract with the defendant.

There is no instance in the books of the whole price being recovered in such a case as this. The plaintiffs must show either that they have paid Messrs. Borradaile, Schiller & Co., or that there is a subsisting and continuing liability to pay them. That was not shown at the trial.

[GARTH, *C.J.*—Is it not sufficient that the plaintiffs are ready and willing to pay?]

They must show more. The word "re-imbursed" in illustration to section 73 of the Contract Act necessarily implies a payment actually made.

PEACOCK, *J.*—Here no release has been given by Messrs. Borradaile, Schiller & Co. Could not the plaintiffs' assignee on

1879

DE ANGELIS v. MAYAPA SETTY.

their insolvency recover the whole amount now claimed—or must he also wait until Messrs. Borradaile, Schiller & Co. have been paid?]

The Assignee would be in no better position than the plaintiffs themselves.

Judgment.

All the cases treat the damages as representing a difference. See Sedgwick on Damages, pp. 235-6.

Again the plaintiff is in the position of the shipowners, and must deduct all expenses for coals and for working the ship not incurred by reason of the defendant's failure to carry out the contract—*Smith* vs. *McGuire*, 27 L. J. Ex., 465; *Morris* vs. *Livison*, 45 L. J. C. P., 409; *Hinde* vs. *Liddell*, L. R. 10 Q. B., 269.

Phillips (on the same side)—If the judgment of the Small Cause Court is to be taken literally, the suit must be dismissed; for the judgment finds that the plaintiffs cannot prove the damages—See *Buchanan* vs. *Avdal*, 15 B. L. R., O. C., 256.

Had the contract been carried out the plaintiffs would have had to work the ship and carry the goods to Tuticorin, and he must now show that the expenses in doing so would not have absorbed the whole of his contract. He cannot make a profit by the defendant's default.

Branson in reply, referred to *Smith* vs. *McGuire*; *Pry* vs. *Hunter*, Abbot, 431; and Mayne on Damages, 250.

The following judgment of the Court (1) upon the Reference was delivered by

GARTH, *C.J.*

GARTH, *C.J.*:—

We are of opinion that for the purpose of ascertaining the amount of damages sustained by the plaintiffs by reason of the defendant's breach of contract the plaintiffs, although sub-charterers, must be considered as between themselves and the defendant to be subject to the same obligations as the owners of the ship.

The damages here cannot be measured quite upon the same principle as in the case of the non-acceptance of goods sold.

The plaintiffs let to the defendant a certain space in the ship

(1) GARTH, *C.J.*, PONTIFEX and WHITE, *J.J.*

for the carriage of his goods, with an implied undertaking that those goods should be safely conveyed to Tuticorin; and whether the plaintiffs worked the ship themselves, or procured it to be worked by others, they must presumably have had to pay, in some shape or other, for the cost of conveyance.

We are therefore of opinion that, on the facts found, the plaintiffs are entitled to recover as damages, a sum equivalent to the entire freight agreed to be paid by the defendant for 680 bags of rice from Calcutta to Tuticorin after deducting therefrom a proportionate part of the expenses of carriage which has been saved by reason of the service not having been rendered.

It has been argued on behalf of the defendants, that the sum payable by the plaintiffs to Borradaile & Co. for the hire of the vessel for the intended voyage should be deducted from the sum payable by the defendant; but we think this is clearly wrong. The damages payable by the defendant must depend upon his own contract with the plaintiffs, and not upon the terms of the bargain which the plaintiffs may have made with Borradaile and Co.

The ship in the present case is a steamer; and we think that upon the facts found she must be taken to have lain idle in port for want of a cargo. The expenses saved could, therefore, be little or nothing more than the cost of the coal that would have been consumed if the steamer had made its intended voyage to Tuticorin.

The proportionate part of these expenses to be deducted from the freight must be ascertained by estimating [as a jury would do] the amount of tonnage which would have been occupied by the 680 bags of rice as compared with the amount of tonnage which the ship could carry.

If the parties cannot agree upon the sum to be deducted, it will be necessary to refer the case back to the Small Cause Court to ascertain the amount.

As the plaintiffs have succeeded substantially in maintaining their claim in this Court, we think that they ought to have one-half of their usual costs from the defendant.

[CIVIL APPELLATE JURISDICTION.]

1879 *May* 30*th*.

No. 2584 of 1879.

RAM RUNJUN CHUCKERBUTTY (DEFENDANT) . . . . . APPELLANT;

AND

RAM LALL MUKHOPADHYA (PLAINTIFF). RESPONDENT.

Suit for rent—Limitation—Suit against assignee of putnidar for balance due on decree for rent—Act VIII (B.C.) 1869, section 29—Act IX of 1871, Sch. II, Art. 110.

Plaintiff, who was the zemindar, having obtained a decree against the auction-purchaser of a putni tenure held under his zemindary for the rents of the years 1279, 1280 and 1281, and being unable to realise the whole amount due under the same, subsequently learned that A, who had purchased a share in the putni from B who derived his title from the original defendant, had been in possession during these years. He then sued A for the balance due under the first decree. This suit was filed on the 21st Baisack 1285. *Held*, that the second suit, whether it was governed by Act VIII (B.C.) of 1869 or by the general law of limitation, was barred, inasmuch as it was a suit for rent and brought more than three years after the arrears became due.

Pitambur Sen vs. *Debnath Roy Chowdhry*, 18 W. R., 132, cited and distinguished.

APPEAL from a decision passed by the District Judge of Beerbhoom, affirming the decree of the Subordinate Judge of that District.

Baboo *Mohiny Mohun Roy*, for Appellant.

Baboo *Kali Kissen Sen*, for Respondent.

The facts are sufficiently set forth in the judgment of the Court (1), which was as follows:—

In this case the defendant No. 1, Rajah Ram Runjun Chuckerbutty, is the appellant before us. The suit was brought on the following allegations:—That one Issan Chunder Sen, who is the defendant No. 5, was the purchaser of a putni tenure, the rent which is in dispute in this case, at a sale under Regulation VI

(1) MITTER and TOTTENHAM, *J.J.*

1879

RAM RUNJUN CHUCKERBUTTY v. RAM LALL MUKHOPADHYA.

Judgment.

9. That the plaintiff, who owns a share in the zemindary, ssan Chunder for the rent of the years 1279, 1280 and nd obtained decrees in different numbers. That a portion amount decreed has been realized by the plaintiff. That intiff has come to learn that during the years 1279, 1280 281, the defendants Nos. 1, 2 and 3 were in possession of tni tenure. Upon these allegations the plaintiff now seeks te these defendants liable for the balance that is still left ized of the rent of the years 1279, 1280 and 1281. In aint the plaintiff simply alleges that these defendants, ng the appellant before us, were in possession of the enure in the years in question, but he does not disclose what title they were in such possession. But it appears an application, which the plaintiff subsequently filed in se, it was alleged by him that the whole putni after Issan er had purchased it was sold to two brothers, Ashootosh d Promoth Nath Deb; that the share of Ashootosh was uently re-purchased by Issan Chunder in the name of his on Kristo, the defendant No. 3; that this share was again nd purchased by Tara Prosuno, the defendant No. 4; that re of Promoth Nath, viz., an eight annas of this putni, d upon his sons Monmoth Nath and Aunath Nath; and e four annas share of Monmoth Nath was purchased by endant No. 1, the appellant before us.

appellant before us, amongst other pleas, objected to the n the ground of limitation. The lower Courts have over- his plea on the strength of a decision of this Court, reported W. R., 132—*Pitambur Sen* vs. *Debnath Roy Chowdhry*.

ppears to us that this case is not governed by the authority by the lower Courts, and that upon the facts admitted plaint, and the petition referred to above, the claim is by limitation. The plaintiff is seeking to make the liable for the balance of the rents of the years 1279, 1281, upon the ground that he, the appellant, was in of a certain share in this putni as purchaser from h, who also derived his title, through his father, from der, the original auction-purchaser of the putni. o, it is clear that between the appellant, who was the

1879

RAM RUNJUN CHUCKERBUTTY v. RAM LALL MUKHOPADHYA.

Judgment.

purchaser of a share in this putni tenure, and the plaintiff zemindar there was relationship of landlord and tenant dur the years in question. It therefore follows that the pres claim, whether it is cognizable under Act VIII (B.C.) of 186 under the general law, is a claim for rent, and nothing else. to the case quoted by the lower Courts, it is evident that facts of that case are not similar to those of the present ca There the landlord, having sued the tenants who had taken lands the rents of which were in arrear by leases direct from hi and having obtained decrees for rent, subsequently sued cert other persons upon the ground that the latter were really in p session of the lands as beneficial holders of the lease, and t the ostensible tenants were mere benamidars. It was laid do in that case that the claim involved in it was not governed by provisions as to limitation in Act VIII (B.C.) of 1869, but the general law of limitation. That decision evidently proce upon the principle that between the beneficial owners of the le and the zemindar there was no relationship of landlord a tenant. As far as we can make out, that was the ground up which the decision in that case on the question of limitati solely rested. But as we have already pointed out it cannot said in this case that there was no relationship of landlord a tenant, in the years in suit, between the plaintiff and the appell before us. Therefore whether this suit is governed by section of Act VIII (B.C.) of 1869, or by Article 110 of the Limitati Act of 1871, it is clear that the claim is barred by limitation, the suit has been brought more than three years after the t when the arrears became due or from the last date of the year in suit.

Upon these grounds we are of opinion that the present suit barred by limitation. But as only one of the defendants, v the defendant No. 1, has appealed, we do not think that in interests of justice it is necessary to set aside the whole dec passed by the lower Appellate Court. We reverse that dec so far as it affects the appellant before us, and dismiss the suit against him. The appellant is entitled to recover his costs this appeal and of the Courts below from the plaintiff.

[CIVIL APPELLATE JURISDICTION.]

S. M. JOGENDRONUNDINEE DOSSEE . . APPELLANT;

AND

HURRYDOSS GHOSE . . . . . RESPONDENT.

1879
July 18th.

No. 10 of 1879.

Conjugal right, Suit for—Condonation.

A suit for restitution of conjugal rights may be maintained by Hindus in this country, although the same state of circumstances, which would justify such a suit, or would be an answer to such a suit, in the case of a European, may not be equally a justification or an answer in the case of a Hindu.

APPEAL from a decision passed by Mr. Justice WILSON in the Original Civil Jurisdiction of the High Court.

In this case the appellant Hurrydoss Ghose sued his wife Jogendronundinee for restitution of conjugal rights. She, on the other hand, refusing to return to her husband on account of his alleged cruelty and adultery, brought a cross suit against him for maintenance. The two suits were heard and disposed off together.

It appeared that the parties were married in December 1868, but did not live together as man and wife until 1870, both having been very young at the time of the marriage. About 1872, the husband gave way to intemperate habits, and to drinking European liquors and eating European food. While under the influence of intoxicating drink he used to beat and otherwise ill-treat his wife. On several occasions in that year he introduced women of low character into her sleeping apartments, and on being remonstrated with, so beat her that she was compelled to take refuge with her father. In January 1873, however, she was induced by promises of her husband's part of future good conduct to return to him to the house of his father Lokenath Ghose.

In April following they left that house, and went to live in a house which he had hired for himself and his wife, and there they lived until about December 1873. During this interval he was in the habit of passing his time with women of low character, bringing them on several occasions into the outer apartments of

1879

S. M. JOGENDRONUNDINEE DOSSEE v. HURRYDOSS GHOSE.

Statement.

the house. He also frequently absented himself for several days at a time, returning generally in a state of intoxication. On his return upon one occasion his wife was so ill-treated by him that she attempted suicide, and but for the intervention of her sister, would have succeeded in putting an end to her life.

About the end of 1873, they went back to Lokenath Ghose's house, but shortly afterwards Jogendronundinee, being in a weak state of health, was removed to her mother's house, where she was visited from time to time by her husband, who at this period was always in a state of greater or less intoxication.

In November 1874, she again joined her husband at Lokenath Ghose's house.

Between this time and January 1876 he frequently beat her, and on several occasions threatened to take her life. In consequence of an attempt on her life she took refuge with her mother in June 1876, refusing to return again to her husband.

It seems, however, that there he visited her occasionally, staying sometimes for eight or ten days at a time, but that he was generally in a state of intoxication. After going to her mother's house she had two children by him. On the last occasion upon which Hurrydoss visited his wife, she remonstrated with him about his conduct, and asked him to give her money instead of squandering it as he was doing. They quarrelled and he struck her a slap in the face. He then left her, and they have never since co-habited, these suits being filed shortly afterwards.

Mr. Justice WILSON was of opinion that everything that had been done previous to the resumption of co-habitation after the last occasion when she went to live with her mother had been condoned, and further that the subsequent slap on the face was not sufficient justification for her separating herself from her husband. The learned Judge accordingly gave a decree for the husband in the suit for restitution, and dismissed the other suit for maintenance. Jogendronundinee thereupon preferred the appeal.

Jackson and *Bonnerjee*, for the Appellant.

J. D. Bell, (Offg.-Ad.-Gen.) and *Bonnaud*, for the Respondent.

1879

S. M. JOGENDRONUNDINEE DOSSEE v. HURRYDOSS GHOSE.

Argument.

Jackson.—There is clear evidence of sufficient cruelty and adultery as would have justified the appellant at one time in leaving her husband. Now, assuming that the English doctrine of condonation applies in this country, and that these acts of cruelty and adultery were condoned, I contend there is evidence of subsequent conduct on the part of the husband sufficient to revive all former acts of cruelty so as to give good ground for the wife bringing a suit for maintenance—*Durant* vs. *Durant*, 1 Hagg., 734.

It is unnecessary that there should be, as there was in this case, actual violence; it is sufficient that there should be enough to justify reasonable apprehension and alarm—*Wilson* vs. *Wilson*, 6 Moore, P. C., 484.

If the English law of condonation does not apply here, my position is stronger. The remedy according to Hindu law of a husband deserted by his wife is pointed out in Colebrooke's Digest, Vol. II, 412. No power is there given for his obtaining restitution of conjugal rights. In the case of *Gatha Ram Mistree* vs. *Moohita Kochin Atteah Domoonee*, 14 B. L. R., 298, MARKBY, J. (see p. 306) expresses a doubt whether restitution of conjugal rights can be ordered under Hindu law. The decision in the case of *Buzloor Ruheem* vs. *Shumsoonissa Begum*, 11 Moore's I. A., 553, was expressly founded on the precepts of Mahomedan law. There are no similar precepts in Hindu law.

If the husband has been guilty of acts of cruelty which would justify his wife in leaving his protection, she is entitled to maintenance—*Sitanath Mookerjee* vs. *Sreemutty Hatmabutty Debee*, 24 W. R., 377. What amounts to legal cruelty is pointed out in *Yamunabhai Narayan Jagnath Bhide* vs. *Narayan Moreshwar Pendse*, I. L. R., 1 Bom., 164.

Again, condonation is not to be held so strictly against a wife as against a husband—*D'Aguilar* vs. *D'Aguilar*, 1 Hagg., 786; *Beeby* vs. *Beeby*, 1 Hagg., 793; and what would be a bar to a suit by a husband would not be so in the case of the wife. The wife may pardon in the hope of reforming her husband. "Forgiveness on the wife's part," it has been said, "is meritorious, while a similar forgiveness on the part of the husband would be degrading and dishonourable"—*Durant* vs. *Durant*, 1 Hagg., 752; *Ferrers* vs. *Ferrers*, 1 Hagg., Con. C., 133.

1879

S. M. JOGENDRONUNDINEE DOSSEE v. HURRYDOSS GHOSE.

Argument.

See *Curtis* vs. *Curtis*, 27 L. J. P. & M., 73; *Greenhill* vs. *Ford*, 2 Shaw's Sc. App. Cas., 443.

[PONTIFEX, *J.*—So far as mere cruelty goes, condonation must be exactly the same in the case of the wife as of the husband. Where there is adultery the law makes a difference as to granting a divorce.]

In the case of *Lala Gabind Prasad* vs. *Doulut Batti*, 6 B. L. R., Appx., 85, it was held that keeping a Mahomedan mistress was sufficient justification for a suit for separate maintenance.

Bonnerjee, (on same side).—Putting aside the question of condonation there is clearly sufficient proof of cruelty and adultery as would entitle the wife to a divorce. The fact of the husband leading the profligate life, which it is admitted the respondent leads, eating and drinking European food and liquors, is sufficient to entitle the wife to a separate maintenance.

A Hindu wife cannot get a divorce. Her position is shewn in Menu, Chap. V, verses 147, 148, the duties of the husband being laid down in Chap. IX, verses 18, 22, 72, 75, 162, 176.

The evidence is that the husband at intervals used to go to the house where his wife was residing, in the evening drunk, and come away in the morning. That does not amount to voluntary resumption of co-habitation.

Assuming, however, that the facts show that co-habitation was voluntarily resumed, that in itself does not amount to condonation—*Keats* vs. *Keats*, 1 Sw. and Tr., 334.

In that case condonation was declared by CRESWELL, *J.*, to mean a blotting out of the offence imputed so as to restore the offending parties to the same position he or she occupied before the offence was committed.

[GARTH, *C.J.*—That is contrary to what CRESWELL, *J.*, laid down in *Curtis* vs. *Curtis*. There he said that condonation was a conditional restoration and merely a relative term. I should say there would be condonation in a case of this kind where the wife was content to live and consort with her husband again.]

Bonnerjee.—That is the language of Lord PENZANCE in the case of *Newsome* vs. *Newsome*, L. R., 2 P. & D., 306, and there it was said that very slight circumstances would revive former acts of cruelty and adultery.

A husband must maintain his wife if she is living apart for just cause—Norton's L. C., p. 31. On the authority of *McCord* vs. *McCord*, L R. 3 P. & D., 237, the husband has not shown himself to be the person in whose favor the Court will interfere.

The Counsel for the respondents were not called on.

Judgment.

The judgment of the Court (1), which was as follows, was delivered by

GARTH, *C.J.* :— GARTH, *C. J.*

We are of opinion that the decree of the Court below should be confirmed.

Speaking only for myself, I confess I think it very probable, that if we only had to consider the comfort and happiness of the parties concerned, the best way of disposing of the case would be to dismiss both suits.

But the parties have taken their own course; they have insisted upon going to the expense of a trial. The case has been decided by the Court below; and we have only to consider whether that decision is right.

Now, although we entertain no doubt that, as a matter of law, a suit for restitution of conjugal rights may be maintained by a Hindu in this country, we are not at all prepared to say that the same state of circumstances which would justify such a suit, or which would be an answer to such a suit in the case of a European, would be equally so in the case of a Hindu. The habits and customs of the native community, specially as regards the marriage state, are so different from ours, that we think in such a matter as a suit for the restitution of conjugal rights, the Hindu and the European cannot always be fairly judged by the same rules.

We are bound to say, however, that in this particular case, the conduct of the husband was such, both as regards adultery and cruelty, as in our opinion to justify the wife at one time in seeking her mother's protection, and if nothing had afterwards

(1) GARTH, *C.J.*, and PONTIFEX, *J.*

1879

S. M. [illegible] DEBENDRONATH DUTTA v. HURRYMOHUN GHOSE.

Judgment.

GARTH, C.J.

occurred, which amounted to a condonation of the husband's offence, we are not prepared to say that he would have been entitled to sue her for the restitution of his conjugal rights.

He appears to have lived a very profligate life. He was not only in the habit of consorting openly with prostitutes, but he seems to have insulted his wife by introducing one of them on several occasions into her private apartments. He indulged habitually in wine and spirits, not perhaps to the extent his wife would lead us to believe, but at any rate so as to be very constantly in a state of intoxication, and when he was in this condition, he ill-treated and threatened his wife with knives and other weapons, in such a way as to induce very natural apprehensions on her part for her own personal safety.

Under these circumstances, she left his house and went to live with her mother under the protection of her own family. Here her husband visited her; and through the wise and proper mediation of her own relatives (her mother and brother) reconciliation to all appearances took place. The husband on the occasion of these visits slept and co-habited with his wife in the usual way, and so far as appears with her full and free consent; on one occasion he stayed with her for several days; and the result of this intercourse was that she became with child.

It appears to us that this conduct of the wife unexplained, is certainly very cogent evidence that she had condoned his previous conduct. We think that if in this state of things he had requested her to return to his house and she had refused to do so, he would have been entitled to bring a suit against her for the restitution of his conjugal rights.

It has been urged upon us strongly on behalf of the wife, that the fact of her thus co-habiting with him at her mother's house must be attributed not to any desire for reconciliation, but rather to a sense of duty and to the obligations under which a Hindu wife is placed to submit herself to her husband's wishes and authority. And we have been referred to a class of cases in England, of which *D'Aguilar* vs. *D'Aguilar* (1 Hagg., 744, &c. & 3 Hogg, 777); and *Curtis* vs. *Curtis* (1 Swabey & Tristram 75 and 192) are a type, where it is undoubtedly said by high judicial authority, that condonation on the part of the wife

1879

S. M. JOGENDRONUNDINEE DOSSEE v. HURRYDOSS GHOSE.

Judgment.

GARTH, *C.J.*

ıust in many cases not be presumed from the mere fact of her ontinuing to co-habit with her husband after infidelity or cruelty ın his part; because a virtuous and self-denying woman will ıften, for the sake of her children, or for the peace or reputation ɔf her family, submit to live and even sleep with her husband as a matter of duty, against her own inclinations, and without any intention of condoning his offence.

No doubt there is much force in this argument, and if in this instance we could see that the co-habitation and apparent reconciliation between husband and wife were the result of actual or moral force or compulsion, we might take a different view of the case.

But here, as it seems to us, the wife was, to all intents and purposes, a free agent; she was under her mother's roof, and the protection of her mother and brother. There was no reason why, if she had so pleased, her husband might not have been excluded from access to her altogether. There was no difficulty about her child, because she had the child under her own charge, and no threats or intimidation appear to have been used by the husband, either to compel compliance with his wishes, or to take away the child from her, in case she refused to consort with him.

We cannot, therefore, accede to the contention of the appellant's counsel, that any force, either actual or moral, was used to coerce her free will, and that being so, we are disposed to put the same construction upon her conduct, as we should upon that of a European lady under similar circumstances, and to say, that a reconciliation did in fact take place, and that she did so to condone his offence, as to restore him to his former conjugal rights and position.

The only remaining question is, whether the slap in the face, which he afterwards gave her on one occasion, was such an act of cruelty and ill-usage, as to neutralize the effect of the condonation, and to justify her in treating the reconciliation, as if it had never taken place.

Mr. Bonnerjee was no doubt quite right in saying that reconciliation, however complete it may be, in the sense of restoring the husband to his former privileges, is so far conditional

1879

S. M. JOGENDRONUNDINEE DOSSEE v. HURRYDOSS GHOSE.

Judgment.

GARTH, *C.J.*

(see *Durant* vs. *Durant*, 1 Hagg., 751; *Curtis* vs. *Curtis*, 1 S Trist., 192) that it depends upon the offence of the husba being repeated; and in the case of cruelty, we quite thinl much smaller measure of offence would be sufficient to ne the condonation than would have justified the wife in tl instance in separating herself from her husband.

But then we consider that the act or acts of cruelty n of such a nature as to give the wife just reason to suppos the husband is about to renew his former course of c and consequently to entertain well-founded apprehensi her personal safety.

Now we cannot put so serious a construction upo occurred in this case. The slap in the face was given w open hand, at a time when the husband was under the in of drink; and in a moment of irritation, when his wi worrying him for money—a subject which seems to hav very frequent cause of discord between them.

The brother certainly says that he heard his sister cr and on coming into the room he saw the traces of tear her face; but considering the state of temporary exci under which the husband was labouring, we think it wo taking too serious a view of the circumstances to say tl blow was sufficient to neutralize the effect of the condo If the wife had only exercised, as she should have done, good sense and discretion, she would have known that not a prudent thing to introduce irritating topics at time; and it is to be hoped that when she returns husband's house, which we think it our duty to require do, she may learn so to regulate her own conduct, and patiently and judiciously with her husband's frailties, as to her own happiness and comfort.

There seems reason to suppose that she is under some as to the character of the woman who is living in Lok house. From the affidavit which has been read to us, it that this woman is an old nurse and dependent of the who has lived there for many years. But we think it after what has occurred, to secure the defendant a home un by the presence of any persons of bad character; a

1879

S. M. JOGENDRONUNDINEE DOSSEE v. HURRYDOSS GHOSE.

Judgment.

GARTH, *C.J.*

ɔropose so far to modify the decree of the lower Court,
: it a condition, that the house which the husband
ıhall be in every respect fit for the reception of a
nd respectable wife.
rds the costs, the Advocate-General has very properly
behalf of his client, to waive his right to them in both
ut much as we approve of the spirit in which that
ıde, we think that we ought only to act upon it,
lly upon the defendant submitting herself to the decree
ırt in all obedience and good faith.
oes so, she will have to pay no costs. If she does not,
ɔay the costs of both Courts on scale 2.
ıarty will be at liberty to apply to the Lower Court
ent of the terms of the decree not being fairly and
arried out.

[CIVIL APPELLATE JURISDICTION.]

:SHAD *alias* HUNOOMAN DASS
:IFF) . . . . . } APPELLANT;

AND

: DASS (DEFENDANT) . . . . . RESPONDENT.

August 16th.

No. 211 of 1879.

:ssion to mourosi—Mohunt, Appointment of—Bandhara ceremony vocation of nomination of chela as Mohunt—Customs of Muths—ualification of Mohunts, how determined.

ıe case of a *mourosi* Muth, the investiture by the leading neigh-
; Mohunts at the Bandhara ceremony, of one who cannot
hat he was actually appointed by the last Mohunt, is not suffi-
ı the absence of proof that he has a right to be so appointed as
enior chela of the last Mohunt, to entitle him to succeed to the
h.

uccession to Muths or religious endowments must be regulated
ase by the nature of the endowment, and the rule of succession
ed by the founder of the institution; and if this rule cannot be
d from the original deed of gift or other documentary
it must be proved in each case by showing what the usage
n the occasion of each succession.
t of a *mourosi* Muth, by a deed of gift in 1849, made over
rty of the Muth to his senior chela and invested him with
of Mohunti; but subsequently a dispute having arisen on
immoral life led by appointee, a compromise was effected,

1879

SITAPERSHAD v. THAKUR DASS.

Statement.

by which the former Mohunt was permitted to take back the Muth and the property belonging to it, the other being allowed merely to retain possession of a subordinate Muth. In 1873 the Mohunt died, leaving a will, dated 6th May 1873, by which he appointed the defendant his successor.

The original appointee thereupon obtained his own confirmation as Mohunt, at a Bandhara ceremony, by the neighbouring Mohunts, and brought a suit against the defendant who was in possession for recovery of possession of the Muth and the properties belonging thereto, relying on the deed of gift of 1849.

Held, that the Muth being mourosi, the plaintiff was not entitled to possession, there being no reason why the deed of gift should not be considered to have been cancelled by the compromise or by the will.

Questions as to whether a claimant to a Muth is a Sunjogi, or whether from his conduct and mode of life he is disqualified for the office, may be determined by a Civil Court.

REGULAR APPEAL from a decision of the Subordinate Judge of Sarun.

This was a suit brought by the plaintiff, Mohunt Hunooman Dass, to set aside a certificate granted under Act XXVII of 1860 in favour of the defendant Thakur Dass, on the strength of a will executed by one Gopal Dass, a Mohunt, and to recover possession of a Muth at Chirand, with the images of the gods and other property, moveable and immoveable, belonging to the Muth. The claim was grounded partly upon a bukshishnamah or deed of gift, dated the 1st of January 1849, by which, he alleged, the late Mohunt Gopal Dass had transferred to him as his principal chela the office of Mohunt and the property in question; and, partly, upon the fact that his title has been confirmed and established according to custom at a Bandhara ceremony, which was held after the death of Gopal Dass, when by the consent of the general body of Mohunts then present, he was invested with the Chudder of the Mohunti.

It appears that in 1856 Gopal Dass took proceedings against Hunooman Dass to have the bukshishnamah set aside, and the property of the Muth restored, on the ground that he was leading an immoral life, keeping a low caste mistress, and was thereby disqualified for the office of Mohunt. It was admitted that Hunooman Dass did after the execution of the bukshishnamah at

1879

SITAPERSHAD v. THAKUR DASS.

Statement.

time keep a mistress. These proceedings, however, resulted in a compromise, a solenamah being executed on the 4th May 1856, under the terms of which the property of the Muth at Chirand was restored to the former Mohunt Gopal Dass, the present plaintiff being allowed to remain in possession of the subordinate Muth at Bazidpore, and the properties attached thereto. Gopal Dass continued in possession of the Muth at Chirand until his death in 1873.

The defendant Thakur Dass disputed the plaintiff's claim on the ground :—

1*st*—That after the bukishishnamah had been executed and the plaintiff placed in charge of the Guddee, the Muth in question was given up to Gopal Dass in consequence of the proceedings, which were, as already mentioned, taken by him against the plaintiff. 2*ndly*—That the succession to the Muth in question was of a mourosi character, and not dependent upon election; and that Gopal Dass had by a will dated the 6th of May 1873, appointed him, the defendant, the Mohunt, and transferred to him the property in question. 3*rdly*.—That the plaintiff had been for years past, and was now either married to, or co-habiting with a woman at Bazidpore, by whom he had several children, and that as being a Sunjogi, he was disqualified from holding the office and performing the duties of a Mohunt.

Upon these and other minor points issues were raised in the Court below; and in the result the Subordinate Judge found entirely against the plaintiff and in favor of the defendant, upon the ground that the plaintiff had failed to make out his case, that the bukshishnamah had been set aside, and that the plaintiff was disqualified as a Sunjogi from holding the Muth. He also held that the defendant under the will of Gopal Dass, and as being his chela, had established a good title to the property claimed. The plaintiff appealed against this decision to the High Court.

Evans, Baboo *Mohesh Chunder Chowdhry*, and Baboo *Rajendro Nath Bose*, for the Appellant.

Woodroffe, Baboo *Unnoda Prosad Banerjee*, and Baboo *Guru Nath Sahoy*, for the Respondent.

1879

SITAPERSHAD v. THAKUR DASS.

Argument.

Evans.—The custom of the Muth is, that the senior c should succeed to the Guddee, but it appears to be usual f Bandhara to be held for the purpose of confirming appointment.

That such is the custom appears from the cases of *Dhunsing* vs. *Miga Gir,* 1 Sel. Rep., 153; and *Ramrutton Das* vs. *Bunn Das, ib.,* 170, where claimants to Muths were held by Court to be entitled to succeed on the ground that they been appointed by the former Mohunt, and that after his d the appointments had been confirmed by assemblies of the ne bouring Mohunt.

We say that the defendant here is not a chela at all, but an illegitimate son of the old Mohunt. If it be so, h ineligible to succeed whether the appointment be by electio the Bandhara, or by the will of the old Mohunt—*Gunes Gi Amrao Gir,* 1 Sel. Rep., 210.

[*Woodroffe.*—As we are in possession it is for the plai to show that he has a good title to succeed, by proving the a special custom of this Muth, under which he is entitle succeed—see *Rajah Muttu Ramalinga Setupati* vs. *Perianay Pillai,* L. R., 1 I. A., 209; Mayne, Hindu Law, p. 354.]

The general law applicable all over India, I contend, is the senior chela should succeed; but that this law may be qual by custom—*Gunes Gir* vs. *Amrao Gir,* 1 Sel. Rep., 210—a from Sarun; see also the opinion of Shama Churn Sircar ir *Vyavastha Chundrika,* Vol. I., p. 221. In *Ramrutton Da Bunmalee Das,* 1 Sel. Rep., 170, the claimant was held ent to succeed as nominee of the old Mohunt, but it does appear whether he would have been entitled to succeed wit proof of his further election by the Bandhara.

In the case of *Mohunt Rama Nooj Doss* vs. *Mohunt D Doss,* 6 Sel. Rep., 262, the claim of the plaintiff, who wa senior chela nominated by the late Mohunt, was upheld ag defendant, who had a prior nomination to the succession fro late Mohunt, and a deed of gift in his favor of the temple its appendages.

As to the necessity for confirmation by an assembly of Mo see *Surbanund Purbut* vs. *Deo Sing Purbut,* 1 Sel. Rep., 296,

Ganga Das and *Mungul Das* vs. *Teluk Das, ib.*, 309; the former case from Sarun and the latter from Tirhoot.

In the case of *Narain Das* vs. *Bindrabun Das*, 2 Sel. Rep., 151, the decision as to an elective Mohuntship turned upon the special custom.

[GARTH, *C.J.*—Is not your contention that the general law is that every case is elective?]

Yes. But I say there may be a special custom which governs the general rule of election, as appears from the decisions in the cases of *Ram Churn Das* vs. *Chuttur Bhoje*, 7 Sel. Rep., 205; and *Mohunt Gopal Doss* vs. *Mohunt Kerperam Doss*, S. D. A., 1850, p. 250; *Gunes Gir* vs. *Amrao Gir*, 1 Sel. Rep., 210.

As to the question whether the benefit which the plaintiff took under the deed of 1849 may be recalled, the unreported case of *Mohunt Persoram Das* vs. *Mohunt Anand Das* (Reg. App. No. 164 of 1874, decided by GLOVER and R. C. MITTER, *J.J.*,) is important. There the chela succeeded in the lifetime of the old Mohunt having been appointed by him by deed, and invested with the turban, &c., and it was held that the old Mohunt who sued to have that deed set aside was not entitled to regain his post. The nomination, therefore, of the Mohunt cannot be revoked even by himself, and the solenamah in this case could not cancel the former investiture. The effect of the solenamah was merely to give Gopal Dass the right to hold during his life so much only of the property as was annexed to the Chirand Muth.

It being, moreover, admitted that I am the Mohunt of part of the lands, it lies on the other side to show a custom by which the Mohuntship may be split up.

The next question is, whether the appellant is to be considered disqualified as an outcaste by reason of his alleged marriage. A chela has no caste. He ceases to have any caste on becoming an ascetic. The evidence is, that the appellant is still in terms of eating with the other Boiragis.

We deny that the appellant was married: we say that he at one time kept a woman, but gave her up on the representation of the old Mohunt.

Then, it is said, that by reason of his former mode of life the appellant is a degraded man and cannot inherit—Colebrooke's

1879

SITAPERSHAD v. THAKUR DASS.

Argument.

Dig., Vol. III, p. 320; but the sin entailing the degradation must be of the first class, p. 323. Now nearly all the cases of disqualification have become extinct. There are still a few, such as blindness, leprosy, impotence, hermaphroditism, which are admittedly good causes of exclusion. Here, however, the sin alleged is one that may be expiated. See Shama Churn Sirkar's Vyavastha Chandrika, Chap. V., 1001; Strange's Hindu Law, 101; and Menu, Chap. V., verse 56. The question, however, of disqualification is not one which a Civil Court can determine. It must be decided by the other Mohunts, and in this case must be taken to have been decided in favour of the appellant, for they have confirmed his nomination.

Woodroffe.—There is no general law applicable to Muths. As laid down in *Mohunt Rama Nooj Dass* vs. *Mohunt Debraj Dass*, 6 Sel. Rep., 262, it will be found that there are three descriptions of Muths, *viz*,—the *mourosi*, where the principal chela succeeds the old Mohunt by appointment by him, or, where there is no such appointment, by the election of the neighbouring Mohunts; *Ram Chunder Dass* vs. *Ghutter Bhoje*, 7 Sel. Rep. 205. See *Greehuree Dass* vs. *Nundo Kissore Dass*, 11 M. I. A., 405; the *punchaiti*, where the office is purely elective; and the *hakimi*, where the appointment is vested in the ruling power or in the endower of the temple.

Now the Privy Council, in *Rajah Muttu Ramalinga Setupati* vs. *Perianayagum Pillai*, L. R., 1 I. A., 209, found that the usage of each Muth must in each case be governed by the particular custom of Mohunti.

This Muth is admittedly not *hakimi*. If it is *punchaiti* the election was avoided at the time of the *solenamah*. No authority, moreover, has been cited to show that the people who elected the appellant were legally a properly constituted bandhara. Then if it is not elective the Muth must be *mourosi*, and the succession according to its particular custom and usage, but no evidence has been given of any particular custom or usage.

No custom has been shown by which the former Mohunt has the power of making a valid transfer during his life-time. But my further contention is, that the *bukshishnamah*, executed

1879

SITAPERSHAD v. THAKUR DASS.

Judgment.

1849, was not an out-and-out gift to the appellant, but a mere authority to him to act for the old Mohunt during the life-time of the latter. It was, however, entirely done away with by the *solenamah*.

The appellant, it is admitted, kept a mistress of low caste, and is therefore incapable of succeeding to the Guddee, there being no evidence of his having undergone expiation. He was ineligible as a "family man" or *sangsaree*.

Baboo *Unnoda Prosad Banerjee* followed in the same side.

Evans in reply.

The following judgments were delivered by the Court (1) :—

GARTH, *C.J.*

GARTH, *C.J.*, (after stating the facts) :—

On appeal to this Court it has been contended by Mr. Evans for the plaintiff that the bukshishnamah, which was made to him, was never in fact avoided; that the only effect of the compromise between the plaintiff and Gopal Dass was, that the latter was allowed to remain in possession of the Muth and property in question for his life; and that upon his death the plaintiff's title to it became absolute, subject only to confirmation, by the neighbouring Mohunts at the Bandhara ceremony, which was afterwards effected.

Mr. Evans contended further that this confirmation was a matter of such general custom that it was essential to the establishment of each successive Mohunt's title, and that the question of his qualification for the office was one which was to be decided by the other Mohunts at the Bandhara ceremony and not by the Civil Court.

In support of this contention he cited several cases from the Select Reports of the Sudder Dewany Adawlut. But it appears to me that these authorities do not intend to lay down any general rule of law of which the Courts can take judicial notice, and which is applicable to all such cases.

I consider that the succession to these Muths or religious endowments must be regulated in each case by the nature of the endowment, and the rule of succession prescribed by the founder

1879

SITAPERSHAD v. THAKUR DASS.

Judgment.

GARTH, *C.J.*

of the institution; and if this rule cannot be discovered fro original deed of grant or other documentary evidence, it be proved in each case by showing what the usage has b the occasion of each succession.

In the case of *Greedharee Dass* vs. *Nund Kishore* (11 Moore's I. Ap., 428), decided by the Privy Council in their Lordships say, that the "only law as to these Mohun their office, functions and duties is to be found in custom and tice; it is to be proved by testimony, and no evidence ha adduced before their Lordships to show that any appointme ever been made in reversion on any former occasion."

It is necessary, therefore, in this case for the plaintif has to establish his claim, to prove what is the rule of s sion applicable to this particular Muth; and then to show according to that rule his claim or title to the Muth has established by proper evidence. It has been said, and I b truly said, in the case of *Mohunt Rama Nooj Dass* vs. *A Debraj Dass*, 6 Select Rep., 262, see p. 268, that Mut generally of one of these descriptions—*mourosi, punchai hakimi.* It is admitted on both sides that in this case the is not hakimi, and I think that there is no evidence to that it is *punchaiti*, or elective; because the only instr upon which Mr. Evans relied to prove that it was so, was r ed, and I think properly rejected, by the lower Court, the ground that it was a copy of a copy, which does not a to have been compared with the original, and therefore c according to section 63 of the Evidence Act, be receiv secondary proof.

I quite agree with the Judge in the Court below that i case the evidence all tends to show that the tenure of the in question is *mourosi*; and this in fact appears to have the case of both parties. The plaintiff claims under a deed the old Mohunt. The defendant under his will. So that rely upon the tenure being *mourosi.* It was so called by Dass himself, in his deposition taken on the 26th of Sept 1860, (Paper Book, p. 116), and the various documents prod and the mode in which the Muth has been dealt with from to time all tend to that conclusion.

1879

SITAPERSHAD v. THAKUR DASS.

Judgment.

GARTH, *C.J.*

The first question, therefore, which we have to determine is, whether under the bukshishnamah of 1849 the plaintiff is now entitled to the property in question? Mr. Evans contends that the conveyance having been once made, and the Muth and other properties transferred to the plaintiff, neither Gopal Dass nor the plaintiff had any right to avoid that transfer; and that the subsequent arrangement was of a temporary character, and merely gave Gopal Dass the right to hold during his life so much of the property as was annexed to the Guddee at Chirand.

I think, however, that whatever may have been the precise intention and effect of the bukshishnamah, there was no reason why by the consent of both parties the deed itself should not have been subsequently cancelled.

Then we find, as a matter of fact, that some six or seven years after the bukshishnamah was executed, Gopal Dass took proceedings to avoid the bukshishnamah, and to dispossess the plaintiff of the Muth and property, upon the ground that he was leading an immoral life, and had thus disqualified himself for the office and duties of a Mohunt.

Upon these proceedings being taken a compromise between the parties was effected by a solenamah, dated the 4th of May 1856, which was duly filed in the Court of the Magistrate of Sarun on the following 17th of June.

By this solenamah it was arranged that the property in question, with the Muth at Chirand should be restored to Gopal Dass, and that the plaintiff should only remain in possession of the subordinate Muth at Bazidpore, with certain properties appertaining to that Muth. Upon this arrangement being effected, certain deeds were executed between the parties to carry out the terms; and it is admitted that from that time the plaintiff continued in possession of the Muth and properties of Bazidpore only, while Gopal Dass resumed and retained possession till his death in 1875, of the Muth and properties at Chirand.

The deeds by which this arrangement was carried out were not proved in the Court below; and as the plaintiff's Counsel has objected to copies of them being produced here, we have had no means of ascertaining their precise purport or language. But it appears that in the year 1860 another suit was brought

1879

SITAPERSHAD v. THAKUR DASS.

Judgment.

GARTH, *C.J.*

by Gopal Dass in the Civil Court for the more complete extinguishment of the plaintiff's rights under the bukshishnamah, and for obtaining possession of the entire property conveyed by it; and that the present plaintiff set up the arrangement of 1856 as a complete answer to that suit. He says in his written statement (p. 77) that "in 1856, on the occasion of the proceedings taken by Gopal Dass, the bukshishnamah was reversed, and a solenamah executed by both parties in full settlement of their differences, by the terms of which the bukshishnamah no longer stood in favor of anybody, and therefore that the claim of Gopal Dass in 1860 for the reversal of the bukshishnamah previously set aside was superfluous, and not fit to be argued."

It seems clear from this statement of the plaintiff himself, that whatever the precise terms of the deeds of 1856 may have been, the effect of them, according to the plaintiff's own view, was to avoid the bukshishnamah altogether, and to effect the arrangement which was subsequently carried out; and it appears to me that, in the face of this statement, it is impossible for the plaintiff to contend now, with any show of justice or reason, that the bukshishnamah is still in force, and that he has a present right to claim under it the Muth and other properties in suit.

I think, moreover, that as the succession to the Muth is not *punchaiti* or elective, the claim of the plaintiff would be in no way advanced by the result of the Bandhara proceedings, even if it had been shewn, which I think it has not, that the Mohunts in the neighbourhood were duly convened, and the Bandhara proceedings regularly conducted.

Then, again, if it were necessary for us to decide the further question, whether the plaintiff is or is not a Sunjogi, and whether from his conduct and mode of life he is disqualified from holding the office, I certainly am not prepared to say upon appeal that the lower Court has arrived at a wrong conclusion in that respect.

I consider that this is a question which should be finally decided under the circumstances by the Civil Court, and not by the neighbouring Mohunts.

We find that in the year 1858 proceedings were taken against the plaintiff by the mother of the young woman with whom he

1879

SITAPERSHAD v. THAKUR DASS.

Judgment.

GARTH, *C.J.*

was living at Bazidpore, upon the ground that he had carried her off illegally against her mother's consent; and that his defence then was that he had married the woman with her mother's consent, and was living with her as his wife. He now says that this defence was false, and that he only lived with her as a concubine. But it is proved by the officer, who was engaged four or five years ago in making the census, that the plaintiff was then residing at Bazidpore in the same house with a woman and three children, who are proved by other witnesses to have been living there for some time: and in face of this evidence, he dares to say, when questioned, that he does not know who the woman and children were.

Some evidence has been given, that although a man may have co-habited with a woman, yet if he afterwards leaves her and makes expiation for the offence, he is not disqualified from officiating as a Mohunt; but there is no sufficient proof in the present case that the plaintiff had even given up this woman with whom he lived, or that he has ever made any such expiation, as would qualify him for the office which he now claims.

Under these circumstances I consider that it is not necessary for us to enter into the further question of the defendant's title. It is sufficient for our present purpose to say that he is in possession of the Guddee and properties of the Muth, and that the plaintiff has entirely failed to establish his claim.

The appeal is dismissed with costs.

PRINSEP, *J.*

PRINSEP, *J.*:—

This is a suit brought to set aside a certificate granted under Act XXVII of 1860, in favor of the defendant, on the strength of a will executed by Gopal Dass Mohunt, and to recover possession of all the properties belonging to the Muth of Chirand, which the plaintiff claims as successor to the said Mohunt.

The plaintiff in his plaint states that each Mohunt has become heir as chela to his "ancestor," and hence that he (the last Mohunt) had no "power to alter the rules of inheritance" by appointing defendant. He adds that, "after the demise or abdication of Mohunt, he (the chela) succeeds his Guru Mohunt to the gaddee, and other Mohunts of the description having assembled

1879

SITAPERSHAD v. THAKUR DASS.

Judgment.

PRINSEP, *J.*

together formally approve of and uphold his succession to th Guddee by granting him a Chudder of Mohunti." He furth states that having appointed him under a deed dated 1st Janua 1849, the late Mohunt Gopal Doss had no power to revoke th appointment.

The defendant states that the deed of 1849 was revoked by th late Mohunt and cancelled by the result of certain legal proceed ings between him and the plaintiff; that the plaintiff is a *Sunjo* or married man, and therefore unfit for the office of Mohunt and that the late Mohunt, for these reasons, duly appointed hi (defendant) as his successor.

A great deal of argument has been addressed to us regardin the rule of succession to such endowments, but it has been settle by a long course of decisions that it depends upon the terms o which an endowment was created, or the usage of each particula endowment, where no deed exists. See *Greedharee Doss* vs. *Nundo kishore Doss*, 11 Moore's I. A., p. 428.

There is no deed in the present case. Mr. Evans, for th appellant, plaintiff, has attempted to show that succession to thi Guddee is determined by the election of other Mohunts; but thi is not the case originally set up by the plaintiff, and the evidenc does not support this contention. The plaintiff has relied on th deed of 1849, as a declaration of his appointment by the la Mohunt; and, though at one time in the course of this suit h seems to have maintained that he was entitled to succeed as th senior chela, this was not pressed upon us, nor could such a tit have been established. From the pleadings it is clear that bo parties rested their titles on their appointment by the late M hunt, and on its being subsequently confirmed by an assembly Mohunts at the Bhandara ceremony, and that this was what th really considered to be the custom to determine the right of s cession to the Guddee of the Muth of Chirand. It, therefore, comes necessary for us to consider who was regularly appoin by the last Mohunt, Gopal Doss, as his successor; and, suppos that the plaintiffs' appointment has been formally revoked, and defendant appointed as the next Mohunt, the exact effect of investiture by other Mohunts of the plaintiff with the Chu of Mohunti.

1879

SITAPERSHAD v. THAKUR DASS.

Judgment.

PRINSEP, J.

The plaintiff relies on the bukshishnamah of 1849, under which he claims to have been appointed by the late Mohunt as his successor—an appointment which, he alleges, never has been and could not have been revoked.

The defendant places his title on a will of later later date executed by the late Mohunt appointing him to the Guddee.

There have been disputes for some years between the present plaintiff and the last Mohunt, and entering further on this case it is desirable that these disputes should be referred to.

In 1849 the late Mohunt Gopal Dass executed a bukshishnamah, or deed of gift, in favor of the plaintiff, his chela. It first of all declares that the Mohunt cannot look after the village affairs belonging to the Muth, because he was engaged in offering prayers and poojas; it next proceeds to state that the plaintiff is qualified to perform the duties of Mohunt of the said Guddee, and render services to the indigent Boiragees of the Guddee as he has been doing these services under the direction of the Mohunt; it then sets forth that the Mohunt has granted and gifted to the plaintiff all the properties belonging to the Muth, and that the plaintiff shall, as full proprietor, hold possession of the properties gifted," and it concludes by a declaration that the grantor, the late Mohunt, has "in no wise any claim or right to the aforesaid property, nor will he in future set up any."

This was followed in 1850 by a mutation of names, plaintiff being recorded by the Collector as proprietor of the properties in the place of Gopal Dass.

Early in 1856 disputes arose, and there were proceedings in the Civil Court and before the Magistrate under Act IV of 1840, relating to the possession of the endowed properties. In the end, on 3rd May 1856, these disputes were compromised. The deed of compromise is not on the record, but its terms are clear from the petitions put in to the Civil Court and that of Magistrate, withdrawing from the proceedings taken. By it the Mohunt Gopal Dass recovered all the properties specified in the bukshishnamah, save and except 16 annas of Mouzah Noorungpore and 6 annas of Mouzah Siddpore which were to remain as *milkiut* "in the possession and appropriation of Mohunt Hunooman Dass (plaintiff in this case), aforesaid chela "without any connection with the old Mohunt."

1879

SITAPERSHAD v. THAKUR DASS.

Judgment.

PRINSEP, J.

In 1860, in consequence of further disputes the old Mohu sued to set aside the bukshishnamah of 1849, as well as the com promise of 1856, and he sought further to recover the properti made over to the present plaintiff under the latter deed in conse quence of his misconduct, and his having married and so ceased t be a Mohunt. The present plaintiff recriminated, bringing simila charges of misconduct against the Mohunt, and on 11th Decembe 1860 that suit was compromised, the present plaintiff being allowe to retain possession of the properties under the solenamah o 1856, subject to certain payments and offerings to the old Mohunt

The next suit was brought in 1873 by the present plaintif against the old Mohunt and the present defendant, to obtain a declaration that a will, executed by the former in favor of the defendant, was null and void, and that the plaintiff was entitled to succeed by virtue of the bukshishnamah of 1849. That suit was dismissed, on the ground that it was premature, until the death of the executant of the will.

The Mohunt Gopal Dass died in 1875, when the present defend ant, on the strength of that will, obtained a certificate under Act XXVII of 1860, to collect the debts due to his estate; and this suit is brought to set aside all those proceedings and to recover possession on the superior title of the plaintiff.

There is no question raised that the defendant was appointed by the last Mohunt as his successor in 1873, or about two years before his death by a duly executed will; but for the plaintiff it is contend ed that he has been previously appointed in 1849, and that that appointment is still good, and has been confirmed by his investi ture with the "Chudder" of office by the leading Mohunts assem bled at the Bhandara ceremony.

From the terms of the bukshishnamah of 1849 it is clear that the late Mohunt did then consider that the plaintiff should succeed him, and that with this object he placed him in possession of the management of all the properties belonging to the Muth and further entrusted him with the duty of serving the indigent Boiragees; but it does not appear that the Mohunt Gopal Dass, the executant of this deed, ever ceased to be the real Mohunt or head of the establishment. He rather recognized the qualification of the plaintiff to succeed him, and in token thereof made over t

him the management of the properties and the performance of certain duties, thus associating the plaintiff with himself as the Mohunt. That this was so is shown by the fact that the Mohunt not long after resumed nearly all the properties, and that up to 1875, when he died, he continued to be the Mohunt of the Muth of Chirand, leaving to the plaintiff two small properties apparently belonging to a subordinate Muth of Bazidpore, and making the holding of those properties subject to the annual payment of a certain sum of money and some offerings. That this was so understood by the plaintiff is shown by his written statement in the suit of 1860, in which he states that the bukshishnamah of 1849 was cancelled by the solenamah of 1856, which took its place. The fact that in the suit of 1860 the Mohunt, in his desire to exclude plaintiff as an outcaste among other things, asked to have the bukshishnamah set aside, does not necessarily show that it was considered to be in force, but indicates rather the eagerness of the Mohunt to cut off the plaintiff from any possible claim to succeed him; and this view is confirmed by the nature of the written statement put in by the present plaintiff in that suit in which he stated that the bukshishnamah was cancelled by the solenamah, and that therefore it was unnecessary to bring a suit to have that cancelment declared by the Court. There is no reason given why the deed of bukshishnamah of 1849 could not be revoked, or why, until he actually ceased to be Mohunt by death or voluntary retirement from office, Gopal Dass should not be competent to appoint from among his chelas whomsoever he might deem fit to be his successor; for it is not proved that the plaintiff had a right to claim appointment merely because he was the senior chela.

1879

SITAPERSHAD v. THAKUR DASS.

Judgment.

PRINSEP, *J.*

There certainly is a strong body of evidence that plaintiff was invested by the leading Mohunt with the Chudder of Mohuntship at the Bandhara ceremony, but it is clear that succession to the Guddee of this Muth was not elective, and, therefore, it seems to me that the investiture of one who was not entitled to succeed as the appointee of the last Mohunt is of no value at least so long as the person so appointed has not been declared to be disqualified or incompetent to succeed, or in other words until the appointment has been declared to be a bad appointment and invalid.

1879

SITAPERSHAD v. THAKUR DASS.

Judgment.

PRINSEP, J.

It may be that if the Mohunts had refused to recognize the appointment made by the last Mohunt of this Muth, on the ground that the person appointed was not a fit and proper person, such an appointment would be open to question; but this does not appear to have happened in this case. Both parties claimed to have been appointed by the deceased Mohunt. The plaintiff relied on the bukshishnamah, the defendant on the will; but this will could have no effect unless the bukshishnamah had been revoked, and both parties, therefore, struggled to get the necessary recognition by investiture at an assembly of the leading Mohunts. So far as the evidence goes, it is clear that the plaintiff succeeded in getting the principal Mohunts to prefer and invest him, though it would seem that some of the Mohunts held aloof and favoured the defendant's claim. The actual appointment by the deceased Mohunt Gopal Dass is, in my opinion, the first and most important point for us to determine. The plaintiff can justly rely on the bukshishnamah of 1849, as a declaration by Mohunt Gopal Dass that he thus recognised him (plaintiff) as his successor. It is, however, clear that Gopal Dass did not cease to be Mohunt, but that the plaintiff rather conducted all the affairs of the Muth under his control.

It is stated that Gopal Dass had no authority to revoke that appointment, because in it he had declared that except in certain matters specified he would "have in no wise any claim or right to the aforesaid gifted property nor will in future set up any," and the deed proceeds:—"I have made a general renunciation and relinquishment, and I have given up all false claim and disputes with reference to this bukshishnamah," but the subsequent conduct of the parties show how they regarded this deed. As soon as Gopal Dass was dissatisfied with plaintiff he managed without opposition to recover all these properties, leaving plaintiff in possession only of a subordinate Muth, Baxidpore, and liable to make certain payments and offerings therefor. This arrangement was accepted by the plaintiff. It appears to me that the solenamah of 1856 superseded the bukshishnamah of 1849. Under it the plaintiff was given certain properties which, except that they were subject to certain charges, were

declared to "remain as milkiut in the possession and appropriation of (the plaintiff) Mohunt Hunooman Dass, the aforesaid chela, without any connection with the old Mohunt." This designation of chela is not important, because the succession in this case does not depend alone on plaintiff's being the chela of Gopal Dass, but on his being also appointed as his successor; it is more important to determine whether this solenamah superseded the bukshishnamah, and whether the appointment under the Bukshishnamah could be and has been revoked. The solenamah which was accepted by all parties clearly set aside the terms of the bukshishnamah, in which Gopal Dass declared that he had no claim or right to the property "specified" in that deed; for he resumed possession of all those properties except 16 annas of Nowrungee and 6 annas of Bazidpore, but it did not absolutely revoke the appointment of the plaintiff as his successor. This was apparently brought to the notice of the old Mohunt; for he, in 1860, sued expressly to set aside the bukshishnamah of 1849, as well as the solenamah of 1856, on account of the plaintiff's misconduct, and the present plaintiff, in his written statement in that suit after setting out the execution of the solenamah, stated that "the bukshishnamah of 1st January 1849 no longer stood in evidence in favor of any body. Under such circumstances, the plaintiff's claim for the reversal of the bukshishnamah previously set aside is evidently superfluous and not fit to be argued in this case." In 1860, therefore, the present plaintiff thought that the bukshishnamah was at an end, and that the solenamah had taken its place. That suit came to nothing.

In 1873, Gopal Dass appointed the defendant by a will, the power to execute which was at once disputed by the plaintiff as has been already stated. There can be no doubt that by this will, if not previously, Gopal Dass did revoke any appointment that he might have made under the bukshishnamah. We have been shown no authority for holding that he could not do so. Anything that could be argued from the terms of the deed itself is clearly negatived by the conduct of the parties in accepting the solenamah which was certainly, as regards the principal object of that deed, a manifest revocation of it. The fact that plaintiff allowed to hold a subordinate Muth, Bazidpore, is no more

1879

SITAPERSHAD v. THAKUR DASS.

Judgment.

PRINSEP, *J.*

indicative of Gopal Dass' intention that he should succeed to t Guddee than of a desire not to expel him without any means subsistence, and so to avoid quarrels during his own lifetim Such conduct is not altogether without precedent, for it appea that in the case of *Dunsing Gir* vs. *Mya Gir*, 1 Select Reports, 15 the Mohunt appointed his principal pupil as his successor a portioned off some of his other properties so that they migl not interfere with him. But whatever motive may have impelle the late Mohunt to make over the subordinate Muth of Bazidpo in his lifetime to the plaintiff, it is clear from the execution c a will in 1873 that the Mohunt did intend to appoint defenda as his successor, and to put an end to any claim that might b set up by the plaintiff, and I can see no valid reason why he wa not competent to do so.

So far, therefore, as the claim of the plaintiff rests on hi appointment by Mohunt Gopal Dass, I am of opinion that h cannot succeed. In the case of a Mohuntship which is here ditary, that is, by appointment and not elective, the investiture b the leading Mohunts at the Bandhara ceremony of one wh could not prove that he was the person actually appointed by th last Mohunt would be invalid; for that would only amount to public confirmation of the appointment made, and would i itself confer no right or title.

There is a further objection made to the competency of th plaintiff in any case to succeed in consequence of his havin married, and thus led a secular, or, in the eyes of religio devotees, an immoral life. The evidence, as detailed by t Chief Justice, leaves little doubt of this fact; and, though it m be said that a course of penance may expiate such a fault, have no evidence that this was undergone. It is not sufficie that he should not have been considered disqualified by t Mohunts who invested him at the Bandhara ceremony. T may be adduced as evidence to contradict the evidence of t "immorality" of the plaintiff, but it cannot be accepted satisfactory on the face of the evidence that there is regard his habits of life.

It may be contended that as defendant has not been inve by the Mohunts as the successor of Gopal Dass, his title is

1879

complete. Possibly this may be so; he is at any rate without doubt the regularly appointed successor, and is entitled to convene an assembly of Mohunts for his investiture; and unless those Mohunts offer some reasonable objection to his appointment, I am of opinion that they are bound to invest him as the Mohunt of the Muth of Chirand.

On all these grounds I agree in dismissing this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

VALAYET HOSSEIN (ONE OF THE DEFENDANTS) . . . . . APPELLANT;

AND

MANIRAN (PLAINTIFF) . . . . . RESPONDENT.

March 28th and Aug. 18th.

No. 877 of 1879.

Mahomedan Law, Gift—Death illness, Gift made during—Murg-ul-mout—Possession of Donee.

Where property, the subject-matter of a gift made by a Mahomedan during his death illness (*murg-ul-mout*), was in the hands of the donee as manager or agent of the donor, it was *held* that the possession of the donee as such manager or agent was not such possession as would render it unnecessary to the validity of the gift that there should have been an actual or formal delivery to him of possession of the property.

APPEAL from a decision passed by the Subordinate Judge of Bhaugulpore, affirming a decree of the Moonsiff of Begoo Serai.

The plaintiff in this case was the daughter of a sister of one Furzund Ally, who died on the 6th of March 1870. She sued to recover possession of her share according to Mahomedan law in the property left by Furzund Ally. The suit was instituted on the 8th June 1877, and the plaint, among other things, contained a prayer for setting aside a hebanamah executed by Furzund Ally during his life-time in favour of the defendant Sheikh Valayet Hossein, the son of another sister of Furzund Ally. The heba was sought to be set aside as being a death-bed gift.

1879

VALAYET HOSSEIN v. MANIRAN.

Statement.

The defendant denied that the heba was a death-bed gift, and further alleged that the execution of the heba was accompanied by transfer of possession.

Sheikh Valayet Hossein, during the lifetime of Furzund Ally, collected the rents and generally managed the estates.

The Moonsiff decreed the plaintiff's claim.

The lower Appellate Court, having found that the hebanamah in question was executed by Furzund Ally when he was suffering from fever, and that he died of that disease within two months from the date of its execution, held, that according to Mahomedan law the gift was void, being executed during death illness. In this view of the case the Subordinate Judge did not go into the question whether the possession of the subject-matter of the gift was transferred by the donor during his lifetime, because that fact, if proved, would not make the document valid.

The defendant preferred a second appeal to the High Court, and his appeal was first heard by Mr. Justice BIRCH and Mr. Justice MITTER.

On this appeal a question of limitation was taken, it being argued that, inasmuch as the plaintiff was seeking to set aside a deed of gift executed by Furzund Ally, the claim was barred by limitation as not having been instituted within three years from the death of the donor.

It was held, however, that the plaintiff must be considered to be merely seeking to recover her share of the heritage left by her ancestor, and that the prayer to set aside the hebanamah, which would be a nullity if her allegations were true, might be treated as surplusage.

The Court was of opinion that the Subordinate Judge ought to have determined what constituted death illness, and also whether there had been a transfer of the subject-matter of the gift. It accordingly remanded the case for the Subordinate Judge to try the following question:—

1*st*.—What is the correct definition of *murg-ul-mout* or death illness according to Mahomedan Law?

2*nd*.—Was Furzund Ally suffering from *murg-ul-mout* or death illness at the time when the hebanamah was executed?

1879

VALAYAT HOSSEIN v. MANIRAN.

Judgment.

3*rd*.—Was possession over the subject-matter of the gift transferred to the donee during the lifetime of the donor?

On remand it was found by the Subordinate Judge that at the time of the execution of the hebanamah Furund Ally was suffering from death illness; that the defendant was the agent of the donor and used to collect his rents, but there had been no overt act showing transfer of possession of the property, the subject of the gift.

Upon these findings the case again came before the High Court, and was heard by Mr. Justice MITTER and Mr. Justice TOTTENHAM.

Moonshee *Mahomed Yusoof*, for Appellant.

Baboo *Nogendro Nath Roy*, for Respondent.

The following judgment of the Court (1) was delivered by

MITTER, *J.*:— MITTER, *J.*

This appeal has been argued again upon the findings of the Subordinate Judge upon the points referred to him. If the appellant fails to establish that the Subordinate Judge is in error as to the finding upon the third question referred to him, it will be unnecessary to express any opinion upon the other two questions.

With reference to the third issue the Subordinate Judge is of opinion that possession of the subject-matter of the gift was not transferred to the donee during the lifetime of the donor. He thinks that the evidence shows that the donee during the donor's lifetime used to collect the rents of the disputed property as an agent of the donor. This was the state of things before the deed of gift took place. After it was executed, no overt act is proved showing transfer of possession. Upon these facts, the Subordinate Judge is of opinion that the gift in question is invalid, because the requisite transfer of possession did not take place.

On behalf of the defendant appellant it is contended before us that under the circumstances of the case, as found by the Subordinate Judge, the possession must be deemed to have been with the donee from before the deed of gift. In support of this contention a passage from Baillie's Digest of Mahomedan Law, at

(1) MITTER and TOTTENHAM, *J.J.*

1879

VAKAYET HOSSEIN v. MANIRAN.

Judgment.

MITTER, J.

p. 514, is cited. The dictum of law contained in this pa is to the effect: "Where the subject of gift is in the hands (donee either as a deposit or commodate loan (âreeut) or (amanut), he becomes the proprietor of it by the gift acceptance, though his taking formal possession of it shoul be renewed." We do not think that the text quoted sup the appellant's contention. It refers to cases where the a possession of the subject-matter of gift is with the donee. mere circumstance of collection of rent from the tenants particular property by an agent does not constitute possessic the latter. The possession is that of the principal whose a he is.

We are, therefore, of opinion that the Subordinate Jud right in the view which he has taken of this question. The a must, therefore, be dismissed with costs of this and the hearing, as well as the proceedings on remand.

July 21st.

Nos. 1872 to 1972 of 1878.

[CIVIL APPELLATE JURISDICTION.]

RAM PROSAD DAS (PLAINTIFF) . . . . . APPELLA

AND

RAJO KOER (DEFENDANT) . . . . . RESPOND

Misdirection—Appeal, Grounds of second.

The fact that the lower Appellate Court has misdirected itself as effect of evidence which has been admitted in a suit, is an error (affording a good ground for a second appeal.

APPEALS against the decision of the first Subordinate J of Bhaugulpore, reversing a decree, dated 31st January 1878 affirming a decree, dated 22nd April 1878, passed by the Mo of Monghyr.

Woodroffe, Mr. *R. E. Twidale*, and Baboo *Rajendro Nath* for Appellant.

Baboo *Mohiny Mohun Roy*, and Baboo *Rash Behary Ghos* Respondent.

1879

RAM PROSAD DAS v. RAJO KOER.

Judgment.

The facts sufficiently appear from the judgment of the Court (1), which was as follows :—

This case is one of about a hundred suits brought to recover rent from ryots in Pergunnah Kajra. The lands are said to be of two kinds, viz., "ek fasla," yielding one crop (the *mukhi* crop), and "Do fasla," yielding two crops in the year, (*rubbi* and *bhadoi*.)

The plaintiff claims by virtue of immemorial custom Rs. 2 per beegah in excess of the rate paid for *ek fusla* land for land yielding *bhadoi* crops.

The defendants all deny the existence of any such custom, and their liability to pay any extra rent in respect of *bhadoi* crops.

The first seventy of these suits came before Baboo Burhma Dutt, a Moonsiff, for trial. He decided the point in question in favor of the plaintiff, and gave decrees accordingly. The remainder of the suits came before another Moonsiff, Mr. C. G. Lewis, who took the contrary view, and dismissed the claims. The whole of the cases coming on appeal before the Subordinate Judge of Bhaugulpore, that Court concurred with Mr. Lewis, and dismissed the suits one and all. The plaintiff has brought them all up to this Court on second appeal.

A contention that the lower Courts had wrongly excluded admissible evidence bearing on the question at issue, has been found to be ungrounded, for in fact all the evidence that was legally admissible was set in. The only contention, therefore, with which we have to deal is this, that the lower Appellate Court has erred in law by misdirecting itself as to the effect of this evidence, and no doubt this is a contention which, according to the authority of cases decided, is proper to be put forward in second appeal. It seems to me that the Subordinate Judge did misdirect himself on more than one point, but that nevertheless he has on the whole so dealt with the evidence, and properly balanced it, that such errors as he has committed do not really effect his decision. There is apparently an error in the proposition laid down by him as to the conditions essential to the proof

(1) MITTER and TOTTENHAM, *J.J.*

1879

RAM PROSAD DAS v. RAJO KOER.

Judgment.

of a custom before it can be given the force of law. For he s that the custom must have always remained uncontested. I be true that the denial of a custom on any occasion by a per sought to be bound thereby is sufficient to invalidate it, no c tom, however ancient, and however generally acknowledg could long retain the force of law. In this respect, therefore, appears that the Subordinate Judge did misdirect himself, this error may have to some extent affected his judgment as the force of certain portions of the evidence. But on read his whole judgment I find that he has very fully, and at gr length, analysed every particle of evidence adduced on both sid and that after full comparison he comes to a distinct finding t the alleged custom is not established, not merely because it on various occasions been disputed, but because there is shown to have been any fixed rule as to its existence and ap cation. The reasons given for declining to accept as suffici the mass of evidence adduced by the plaintiff are such as a Co is fully entitled to act upon, and this Court cannot, on sec appeal, over-rule the lower Court's opinion of that evidence un it finds that that opinion has been arrived at illegally.

We dismiss all these appeals with costs.

[PRIVY COUNCIL.]

KALI KISSEN TAGORE . . . . . APPELLANT; 1879 *June 11th.*

AND

JODOO LAL MULLICK . . . . . RESPONDENT.

Riparian ownership—Tidal unnavigable Stream, Proprietorship of—Obstruction to Tidal Stream—Cause of action—Easement.

The plaintiff, who was the proprietor of lands and premises on one side of a tidal, but unnavigable khal, the proprietorship of which was vested in the Government, sued the defendant, the proprietor of lands on the other side, to have removed a wall which the latter had constructed, and which encroached upon the stream, on the ground that damage might result to his lands and premises by reason of such encroachment upon the stream. It was not shown that the flow of the stream had been sensibly altered, or that the plaintiff had a right or easement to have the water flow in its accustomed manner.

Held, reversing the decision of the High Court, that the suit would not lie, the encroachment having been on the soil of the Government without any sensible injury to the plaintiff.

Bickett vs. *Morris*, L. R., 1 H. L., Scotch App., 47, cited and distinguished.

APPEAL from a decision of a Division Bench of the High Court, Calcutta (AINSLIE and MCDONELL, *J.J.*,) reversing the decision of the Additional Judge of the 24-Pergunnahs.

Leith, Q. C., and *Doyne*, for the Appellant.

The judgment of the Judicial Committee (1) of the Privy Council was as follows:—

In this case the plaintiff and defendant were proprietors of land and gardens on opposite sides of a khal in which the tide in the river Hooghly flowed and re-flowed, and by which the surface water of certain lands was carried in a direction from the east to the west into the Hooghly. The plaintiff was the proprietor on the north side, the defendant on the south side, just at the mouth of the khal. It seems that it is a tidal creek which is daily sub-

(1) Sir JAMES W. COLVILE, Sir BARNES PEACOCK, and Sir ROBERT P. COLLIER.

1879

KALI KISSEN TAGORE v. JODOO LAL MULLICK.

Judgment.

ject to the flow of the river; that for the protection of t banks on each side of the khal, walls had been erected, one each side of the khal, and that the defendant, upon the wall c his side becoming somewhat dilapidated, constructed a fres one, and employed a skilled person to do so, who to some degre altered the direction of the wall; a portion of it he buil further in towards the defendant's land than it had been befor and another small portion he built a little further out. W have the precise extent to which it was built further out which was five feet, making what may be called in one sense a encroachment, consisting of a triangle whose altitude was fiv feet, and whose base was about double that length. The plaintiff, it appears, first applied to Mr. Whitfield, the Government Engineer, desiring Mr. Whitfield to interfere, on the ground that the defendant's wall was an obstruction to the public navigation in the khal which belonged to the Government. Mr. Whitfield declined, however, to interfere on many grounds, one of which was, that the khal was not navigable, and another that there was in his opinion no obstruction.

The plaintiff thereupon brought this action. It is stated to be a suit "for possession of land by demolishing a brick-built retaining wall." He goes on to aver:—"By the said act of the defendant, injury having accrued to the retaining wall of my garden, and inconvenience having been caused to the passage of boats to my screw house through the said khal, and apprehensions being created as to the screw-house falling down eventually, a cause of action has arisen. Therefore my prayer is that a decree be given directing the removal of everything built by the defendant that stands on the disputed land mentioned below, and awarding me possession of the land and khal in question." His case was, that he was entitled to the soil on which the defendant had built his wall; that his navigation was obstructed, and that there was a danger of his screw-house falling down. It is true that he subsequently presented a petition, in which he prayed that, if he was not entitled to possession of the disputed land, still, if it was found that the retaining wall ought to be removed, there should be a decree granting that remedy. The petition was, however, rejected.

1879

KALI KISSEN TAGORE v. JODOO LAL MULLICK.

Judgment.

The case came before two Subordinate Courts. The Court of the Moonsiff found that the plaintiff had no right to the bed of the khal or any part of it, but that the defendant had a right *ad medium filum*. He further found that the khal was not navigable, and that no injury had been caused to the plaintiff, and that the flow of the water had not been in any way sensibly obstructed.

On appeal to the Subordinate Judge, he affirmed the findings, with an exception which constitutes the chief difference between the decrees, that neither the plaintiff nor the defendant had any right to the bed of the khal, which, it would appear, is vested in the Government in right of their zemindary of the 24-Pergunnahs. The finding of the Subordinate Judge is in these terms:—"The conclusion, therefore, at which I arrive is, that the defendant has in fact committed an encroachment though not upon the plaintiff's property; but that it is not established that damage to the plaintiff's property must necessarily result from the encroachment. Plaintiff therefore is not entitled to have the wall removed."

The case came on Special Appeal before the High Court; and the High Court, having remanded the case for the purpose of ascertaining the precise extent of the encroachment, considered themselves bound to reverse the decisions of both the Courts, and to order the removal of a portion of the defendant's wall, apparently on the authority of the case of *Bickett* vs. *Morris*, L. R., 1, H. L. Scotch App., 47. The effect of that case may be stated thus:—A riparian proprietor on one side of a stream complained of the riparian proprietor on the other side, who had built into the solum of the stream beyond a line which had been agreed upon between the parties, and had thereby obstructed and changed the flow of the water, so that the plaintiff's right to have the water flow in its accustomed manner was injured. It was held that such an obstruction was such an injury to the plaintiff's rights as enabled him to support the action without proof of actual damage, immediate or even probable. The *ratio decidendi* is illustrated by the remark of the Lord CHANCELLOR. "It was asked in argument whether a proprietor on the banks of a river might not build a boat-house upon it?

1879

KALI KISSEN TAGORE v. JODOO LAL MULLICK.

Judgment.

Undoubtedly this would be a perfectly fair use of his rights, provided he did not thereby obstruct the river or divert its course; but if the erection produced this effect, the answer would be that essential as it might be to his full enjoyment of the use of the river, it could not be permitted."

Their Lordships observe that in a subsequent case in the House of Lords, of *Orr Ewing* vs. *Colquhoun*, L. R., 2 App. Ca. 839, not in itself having much bearing on the present, inasmuch as it related to the obstruction of a navigable stream. Lord BLACKBURN explains the previous case in this manner:—"The Defender had without any right built an encroachment on his side of the river which necessarily caused more water to flow on the pursuer's side; and, though that encroachment was small, it was such as in a small stream to make a sensible alteration in the flow. That was an injury to the proprietory right of the pursuer, but he was not able to qualify present damage."

Their Lordships are of opinion that the case of *Bickett* vs. *Morris* does not govern the present. In the first place, the plaintiff does not state his cause of action in the manner in which it was stated in *Bickett* vs. *Morris*. The plaintiff does not state that he, as a riparian proprietor, was entitled to the flow of the water as it had been accustomed to flow, and that that flow was seriously and sensibly diverted so as to be an injury to his rights, but he puts his case on the ground that he is the owner of the soil on which the wall was built—an issue which is found against him. It is true that he sought to enlarge his plaint, and avail himself of any ground he might have for obtaining the removal of this wall; but their Lordships do not find that he has either claimed or proved such an easement as that which has been described in the case of *Bickett* vs. *Morris*, and which was there interfered with, or that any issue was raised as to such a right of easement. It appears that the plaintiff, at all events, has not all the rights of a riparian proprietor, or he would have been entitled to the bed of the stream *ad medium filum*. It may be that this khal being in possession of the Government, the Government may be able to do what they like with it; and if the plaintiff would have no right to complain, as against them, of any interference with the flow, it does not seem clear wha

1879

KALI KISSEN TAGORE v. JODOO LAL MULLICK.

Judgment.

right he could have against a riparian proprietor on the other side. But further it has not been found in this case, indeed the evidence on the whole points in the other direction, that the defendant, by what he has done, has, to use the words of Lord BLACKBURN, sensibly altered the flow of the water. Without establishing this the plaintiff has failed to show any such injury to his right as would support an action. All that has been found is that the defendant encroached on the bed of the khal, which is the soil of the Government, without causing any sensible injury to the plaintiff. There may be, where a right is interfered with, *injuria sine damno*, sufficient to found an action; but no action can be maintained where there is neither *damnum* nor *injuria*.

Under these circumstances, their Lordships are of opinion that the High Court was wrong in reversing the decision of the lower Courts, and ordering, as they did, the wall to be removed; and their Lordships are of opinion that the decision of the Subordinate Judge was right.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court be reversed; that the judgment of the Subordinate Judge be affirmed, and that the appellant have the costs of the appeal in the High Court and also the costs of this appeal.

[CIVIL APPELLATE JURISDICTION.]

1879 *Aug.* 12*th.*

No. 899 of 1878.

SITA NATH SHAHA (PLAINTIFF) . . . . APPELLA

AND

NOBIN CHUNDER ROY AND OTHERS (DEFENDANTS) . . . . . RESPOND

Parties—Benamidar, Suit in sole name of.

Where a suit is brought in the name of a benamidar only, the ought to direct that the beneficial owners should be made parties not to dismiss the suit.

APPEAL from a decision of the Officiating Judge of Rajsh affirming the decree of the Second Subordinate Judge of district.

Baboo *Mohiny Mohun Roy*, Baboo *Sosheebhoosun Dutt*, Baboo *Rashbehary Ghose*, for the Appellant.

Baboo *Greeja Sunkur Mozoomdar*, for the Respondent.

The facts sufficiently appear from the judgment of the ((1), which was as follows:—

The plaintiff brought this suit to obtain possession of thre of four properties secured by a deed of mortgage, an inter more than a year having elapsed since the notice of forecl was given.

The plaintiff appears as assignee of the motgagee, having chased his rights and interests under the mortgage instru on the 15th Srabun 1275. The lower Court dismissed the on the ground that "the plaintiff Sita Nath Shaha is a midar for Gobind Nath and Shumbhu Nath, in the matter c purchase deed of conditional sale sought to be enforced that as such benamidar he cannot sue." The Court decide on the authority of the case of *Meheroonnissa Bibee* vs. *Churn Bose*, 10 W. R., 220. In that case the judgment Division Bench of the High Court was delivered by Mr. J DWARKA NATH MITTER. His argument is expressed in

(1) MORRIS and PRINSEP, *J.J.*

1879

SITA NATH SHAHA v. NOBIN CHUNDER ROY.

Judgment.

words:—"With regard to the right of a mere benamidar to maintain an action in the Civil Court for a property in which he has no beneficial interests whatsoever, I think there can be but one opinion. Suppose, for instance, the suit is decided against the benamidar, and the party really interested then institutes another suit for the same property against the same defendant. Will the principle of *res judicata* apply to such a suit? The real owner would say my benamidar had no right to bring the former action, and I never authorized him to do so. But be this as it may, it is abundantly clear that because the benami usage is permitted by our Courts, it does not follow as a necessary consequence that the real owner should be permitted to keep himself aloof, and to carry on "litigation in the name of a person who has no interest whatsoever in that litigation so far as himself is concerned. The plaintiff in this case filed a verified plaint alleging that he is the owner of the property in suit. The lower Court has found that this allegation is false, and is the Court still to go on and declare that the plaintiff is the owner of the property in suit? Such a contention appears to me too absurd to require any further comment."

It appears to me that the correctness of this as a proposition of law is open to question. Under the instrument of sale the legal title would seem to vest in the benamidar, and when the beneficial owner allows the benamidar to appear to the world as the real purchaser, a Court of Equity would hesitate to say that when a suit is brought by the benamidar on the strength of his title, the beneficial owner is not bound by the act of the benamidar. However this may be—and it is not necessary to decide this point—it is clear that in subsequent cases Mr. Justice DWARKA NATH MITTER considerably modified the view here expressed. In the case of *Fuzeelum Beebee* vs. *Omdah Beebee*, 10 W. R., 469, which was tried by the late Chief Justice Sir BARNES PEACOCK, and Mr. Justice DWARKA NATH MITTER, the former, in delivering the judgment of the Court, remarked as follows:—"If, therefore, Keramut Ali was the real purchaser, and the name of his son-in-law, Abdool Wahed, was used as a blind, and that it might not appear that the purchase was a purchase by the vakeel for his client, Keramut Ali ought to have been made a party to the suit

1879

SITA NATH SHAHA v. NOBIN CHUNDER ROY.

Judgment.

as plaintiff, in order that the sale of the mokurraree and th absolute interest in the land might have been impeached."

So again in the case of *Kalee Prosunno Bose* vs. *Dino Nat Bose Mullick*, 18 W. R., 435, a Bench of three Judges of thi Court, composed of the late Chief Justice Sir RICHARD COUCH Mr. Justice L. S. JACKSON, and Mr. Justice DWARKA NATH MITTER, made these remarks in the judgment of the Court which was delivered by Sir RICHARD COUCH :—"It has been objected for the respondent that the suit ought to have been dismissed, because the plaintiff was not the real purchaser. In *Fuzeelum Beebee* vs. *Omdah Beebee*, 10 W. R., 469, it was held that, where a purchase was made in the name of another, the real purchaser must be the plaintiff, and the suit cannot be maintained in the name of the other person. Taking the evidence of Kedar Nath Bose to be entirely true, he ought, by the rule of Courts of Equity, to have been a co-plaintiff; and for his not being so, the decree might be reversed on an appeal."

There is also a case—*Ram Bhurosee Singh* vs. *Bissesser Narain Mahata*, 18 W. R., 455—in which Sir RICHARD COUCH went further and held that a benamidar can sue in his own name. However without going this length, we think it sufficiently established by the authority of this Court, that if the beneficial owner is joined as co-plaintiff with his benamidar, the suit can proceed. In the present instance this course ought to have been pursued. Serious injustice may be occasioned if the suit be dismissed on the technical ground that the plaintiff as benamidar cannot sue alone. We, therefore, direct that Gobind Nath and Shumbhu Nath be made co-plaintiffs in the suit, and we remand it to the lower Court to be tried on the merits.

[ORIGINAL CIVIL JURISDICTION.]

KANYE LALL KHAN AND ANOTHER . . . PLAINTIFFS; 1879. July 25th.

AND

KHETTERMONEY DOSSEE AND OTHERS . DEFENDANTS.

Tender—Contract Act (IX of 1872), section 38.

Under a mortgage deed taken to secure the repayment within three years of a sum of Rs. 16,000 advanced by the plaintiff, with interest at 15 per cent. from the 2nd July 1874, the date of the mortgage, it was stipulated that interest should be paid every six months, but that if a year's interest should be unpaid, then the whole amount due for principal and interest should become payable at once; and also that the mortgagor might, after payment of interest, pay towards satisfaction of the principal, any sum not less than Rs. 1,000.

The first year's interest was allowed to get into arrear, but in September 1875 the defendant went to the plaintiff with Rs. 19,000, a greater sum than was due for principal and interest, and told him to repay himself from that sum. The offer was refused, and the plaintiff thereupon brought a suit on the 9th July 1877 for Rs. 16,000, with interest from the date of the mortgage to the date of the suit and subsequent interest.

Held, that the tender made by the defendant, although not valid according to English Law, was valid under section 38 of the Indian Contract Act.

Per WILSON, *J.*—Section 38 of the Indian Contract Act substantially requires that there should be a genuine and unconditional offer, in case of payment, to pay unconditionally at a proper place, made by a person in a position to pay.

THIS was a suit brought by Ramdhone Khan, the father of the present plaintiffs, for the recovery of Rs. 16,000 with interest thereon, at the rate of 15 per cent. per annum from the 2nd July 1874.

Ramdhone died after the institution of the suit, which has since been revived by his two sons, the present plaintiffs.

The suit was brought upon a mortgage, dated 2nd July 1874, executed by the defendants to secure a sum of Rs. 7,722-2, then due to Ramdhone Khan, and a further sum of Rs. 8,277-14 then advanced by him to the defendants.

1877

KALEE LALL KELY v. KHETTERMONEY DOSSEE.

Judgment.

It was stipulated that interest at the rate of 15 per cent. should be chargeable from the date of the mortgage, and that the whole amount of Rs. 16,000 with interest thereon should be repaid within three years.

It was further agreed that if one year's interest should be unpaid, the whole of the principal and interest should become due, and that the mortgagees might thereupon insist upon their rights and sue to recover what was due upon the mortgage. There was a clause, also, under which the defendants might, after payment of interest due, pay towards principal, before the expiration of the three years, any sum not less than Rs. 1,000.

No part of the principal or interest for the first year was paid within the year, but the defendant Khettermoney Dossee alleged that on the 17th August 1875 she had borrowed a large sum of money, out of which she placed Rs. 19,000 in the hands of one Janoky Nath Roy, to be made over by him in payment of the whole amount of principal and interest due upon the mortgage.

The attorney of Janoky Nath Roy was called as a witness, and stated that he had gone to the plaintiff with Rs. 19,000, (in one thousand and five hundred rupee notes) a greater sum than was sufficient to satisfy the amount due on the mortgage, and that he had tendered the Rs. 19,000 to the plaintiff, and asked him to re-pay to himself therefrom the amount due; but that this tender had been refused.

The suit was instituted on the 9th July 1877.

Branson and *Bonnerjee*, for the Plaintiffs.

R. Mitter, for the Defendants.

The following judgment was delivered by

WILSON J. WILSON, *J.* :—

I think that the defendants have made out, as they undertook to make out, that they were entitled to tender the amount due upon the mortgage for principal and interest, and that they did in September 1875 tender that amount.

1879

KANYE LALL KHAN v. KHITTERMONEY DOSSEE.

Judgment.

WILSON, *J.*

The money secured by the mortgage was to be repaid with interest thereon at the rate of 15 per cent. within three years certain, but there is a clause in the mortgage deed for the benefit of the lender, that if a year's interest should be unpaid, the whole amount of principal should become due and payable. There is also a clause for the benefit of the borrower authorizing him, after paying the interest due, to pay towards the principal any sum not less than Rs. 1,000, and this clause, I think, enables him at any time to pay off the whole amount due. It seems to me, therefore, that the defendants were entitled to make the tender which was made.

If the attorney of Janoky Nath Roy speaks correctly, (and he speaks from his day book,) he went to the plaintiff with Rs. 19,000 in notes of Rs. 1,000 and Rs. 500, and told him that he had brought that amount, and asked him to take from it what was due upon the mortgage.

I am inclined to agree that that would not be a good tender according to English law, but the rules as to tender in England are exceedingly rigid, and the framers of the Indian Contract Act appear to have thought that less rigid rules were necessary. Section 38 of that Act seems to me substantially to require that there should be a genuine and unconditional offer, in case of payment, to pay unconditionally at a proper place, made by a person in a position to pay.

It was unnecessary to have the notes changed as the offer was refused.

The plaintiffs therefore are entitled only to a decree for the amount of principal with interest from the date of the mortgage until the date of tender.

The defendants must have the costs of the suit.

[ORIGINAL CIVIL JURISDICTION.]

1879. September 9th.

CALLY CHURN MULLICK . . . . . PLAINTIFF;

AND

BHUGGOBUTTY CHURN MULLICK AND OTHERS . . . . . } DEFENDANTS.

Abatement of suit on death of sole plaintiff after decree—Civil Procedure Code, sections 232, 365, 372—*Limitation Act, XV of* 1877, *Sch. II, Art.* 171.

A sole plaintiff having died after decree, an application was made mo than 60 days after his death, by his legal representative for an ord that his name might be substituted on the record for that of the origin plaintiff, and that a sum of money to which the original plaintiff, if aliv would have been entitled might be paid to him, the legal representativ *Held*, that section 372 of the Civil Procedure Code, did not apply to th case, that section contemplating a proceeding before the determination the suit, and further that the application was barred by Act XV of 187 Sch. II, Art. 171. *Held* also that section 232 had no application.

Section 365 of the Civil Procedure Code (Amended by Act XII 1879, section 61) does not apply to the case of a sole plaintiff dyi after decree, the right to sue being merged in the decree.

IN this case an application was made on behalf of Lollit Moh Mullick, the son and heir and legal representative of Cal Churn Mullick, deceased, the plaintiff in the suit, that his na might be substituted for that of his father, and that the intere on a sum of Rs. 30,000 in Court, to which his father if al would have been entitled, might be paid out to him.

The decree in the suit which was for partition was made on 13th September 1866, and Cally Churn Mullick, who was plaintiff, died on the 16th day of January 1879.

Bonnerjee, for the Petitioner.

J. D. Bell (Officiating Advocate-General) *contra*.

Bonnerjee.—The rights of the parties have already been de mined by the decree of 1866. Under that decree the orig plaintiff would now have been entitled, if alive, to payment of interest on the sum of money in Court. The petitioner, how

1879

CALLY CHURN MULLICK v. BHUGGOBUTTY CHURN MULLICK.

Argument.

as his heir is now entitled to have that interest paid to him. But inasmuch as payment of money in Court in a suit can only be made to parties to a suit regularly constituted, it is necessary that the petitioner's name should be substituted upon the record for that of the deceased plaintiff.

Section 372 of the Code empowers the Court to make that substitution in the present case; for there has been a devolution of interest not otherwise provided for in the Code. Sections 365 and 366 do not apply, as they clearly have reference to a state of circumstances prior to decree.

The Court has also power to grant the relief sought under section 232, which relates to the execution of decrees.

In the case of *Shamloll Mullick* vs. *S. M. Monemohenee Dossee*, No. 7 of 1878 (unreported), where one of the defendants died after decree in a suit for partition, but pending the division of the property, PONTIFEX, *J.*, held that section 372 applied, and not any of the earlier sections of Chapter XXI.

A similar question was raised before WILSON, *J.*, in *Bhoyrub Dos Johurry* vs. *Doman Thakoor*, 4 C. L. R., 374, where the legal representative of a sole plaintiff deceased was allowed, under section 371, to be substituted on the record for the original plaintiff after the expiration of 60 days from his death.

J. D. Bell (Officiating Advocate-General).—This application is barred, as having been made more than 60 days after the death of the plaintiff—Act XV of 1877, Sch. II, Art. 171. The suit is dead, and section 372 cannot apply; nor does section 232 apply, for that relates to execution of decrees, and this is not an application for execution.

In the case of *Shamloll* vs. *S. M. Monemohenee Dossee*, section 368 was held not to apply because defendant died after decree, while section 372 was held to apply as being applicable to all cases of devolution of interest other than those provided for by the earlier sections; but there the application was made within 60 days from the death of the deceased defendant.

In the other case cited, the first part of the application, which was to revive the suit under section 365, was held to be barred. The petitioner there also sought to set aside an order for abatement.

1879

CALLY CHURN MULLICK v. BHUGGOBUTTY CHURN MULLICK.

Judgment.

BROUGHTON, *J.*

Bonnerjee in reply.

The following judgment was delivered by

BROUGHTON, *J.* :—

This is an application on behalf of Lollit Mohun Mullick, son and heir and legal personal representative of Cally Cl Mullick, the above plaintiff, deceased, that his name be substit in the room of that of Cally Churn, and that this suit an proceedings therein, which had abated by reason of the deat the said Cally Churn Mullick, be revived.

It appears that the suit was brought to determine the righ the parties who were members of one family to certain turn worship of the idol Radhabullubjee.

The case was heard on the Original Side of this Court, then in appeal. The decree in appeal was dated the 13th of September 1866, and by that decree the turns of wo were declared. Cally Churn and Bhuggobutty Churn ordered to bring into Court 4 per cent. Government secu for Rs. 30,000 which were to be appropriated to the wo of the idol, the interest being paid to the persons whose tu happened to be to conduct the worship.

This decree has been duly carried out, the Rs. 30,000 been brought into Court, the turns of worship have been enj as directed, and the interest has been duly paid to the person ducting the worship for the time being.

The next turn of worship would have devolved upon Churn on the 1st day of Assin, corresponding with the 16th of September 1879.

But Cally Churn died, on the 16th day of January, leavi widow, and the present applicant, his adopted son.

The son makes this application in order that he may ol payment to himself of the interest on the Government secu which are in Court, during his turn of worship.

This being a proceeding after decree must be governed b provisions of the Civil Procedure Code of 1877, so far a applicable to the High Court. Section 365, as amended b

XII of 1879, section 60, runs as follows:—"In case of the death of a sole plaintiff or sole surviving plaintiff the Court may, where the right to sue survives, on the application of the legal representative of the deceased, enter his name in the place of such plaintiff on the record, and the suit shall thereupon proceed."

In this case, however, there is no right to sue surviving. The suit has long since terminated, and the right to sue is merged in the decree.

It appears to me that the section does not apply to a case in which a decree has been made. And moreover the application to be made under that section must, under the new Limitation Act, XV of 1877, Schedule 2, Art. 171, be made within 60 days of the date of the plaintiff's death, so that the applicant, even if he could apply, would be out of time. Nor do I think that any order can be made under the next section 366, as amended by Act XII of 1879. Section 61 of the latter Act, enacts that:—

"If, within the time limited by law, no such application be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the Court may pass an order that the suit shall abate, and shall, on the application of the defendant, award to the defendant the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff; or, the Court may, if it think proper, on the application of the defendant, and upon such terms as to costs or otherwise as it thinks fit, pass such order as it thinks fit for bringing in the legal representative of the deceased plaintiff, or for proceeding with the suit in order to a final *determination* of the matter in dispute, or for both these purposes," &c.

So that an order under this section is to be made with a view to the final termination of the suit, but this suit has already been finally determined, and the decree has been completely satisfied.

Section 372, which is relied on, clearly contemplates a proceeding before the determination of the suit. It enacts that:—"In other cases of assignment, creation or devolution of any interest *pending the suit*," &c.

It is then suggested that section 232 enables the Court to execute the decree in favor of the present applicant, but this is

1879

not an application to execute the decree which has been alread executed.

The case of *Bhoyrub Dass Johurry* vs. *Doman Thakoor*, 4 Ca L. R., 374, to which Mr. Bonnerjee has referred me, was one i which the sole plaintiff died before decree, and it was declared t have abated under section 366, and was revived at the same tim under section 371.

I think this application must be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

July 14th.

No. 310 of 1879.

RUDER PERKASH MISSER (PLAINTIFF) . . APPELLANT;

AND

HURDAI NARAIN SAHU AND ANOTHER (DEFENDANTS) . . . . . RESPONDENTS.

Mitakshara Joint Estate—Sale in execution of decree against member of joint family—Purchaser, Right of—Gift of joint property by one of two members of joint family to the other—Act XL of 1858, *section* 12—*Suit by Collector on behalf of infant.*

Certain joint property held under Mitakshara law by A and his in fant son B was attached and sold in execution of a decree against A for his own personal debts. Between the date of the attachment and the sale, A made over all his property to B by deed of gift. The Dis trict Judge thereupon directed the Collector to take possession o behalf of the infant, under Act XL of 1858, section 12. The Collecto accordingly did so, but, subsequently, he had to bring a suit, in A's lifetime, against the execution-creditor who had taken possession unde the decree, to set aside the auction sale.

Held, that inasmuch as by reason of the deed of gift the propert which the Collector was directed to take charge of, and administer wa not the interest of a member of joint Mitakshara family—the Co lector might on behalf of the infant institute such a suit.

Held further, on the authority of the case of *Deendyal Lall* vs. *Jugde Narain Singh*, 1 C. L. R., 49, L. R., 4 I. A., 247, that all that passed und the execution sale was the right and interest of A in the disputed pr perty, and that it was unnecessary to enquire whether the debts f which the decree was obtained were binding upon the son or not.

Held, also, that the rights of all parties might be determined in t present suit upon the plaintiff's mother being added a party. *Sum Thakoor* vs. *Chunder Mun Misser*, 5 C. L. R., 26, followed.

1879

RUDER PERKASH MISSER v. HURDAI NARAIN SAHU.

Statement.

THIS was a suit brought by Abdul Wahub, a manager appointed by the Collector of Monghyr on behalf of the plaintiff Ruder Perkash Misser, a minor, of whose estate the Collector has taken charge in accordance with an order passed by the District Judge under section 12 of Act XL of 1858. It relates to 8 annas of Mouzah Singhole, which is in the possession of defendant No. 1, Hurdai Narain Sahu, under a purchase in execution of a money-decree obtained by him against the defendant No. 2, Pundit Shib Perkash, the father of the minor plaintiff.

It appears that the whole 16 annas of Mouzah Singhole was the property of the minor plaintiff's grandfather, who died leaving him surviving two sons, the aforesaid Shib Perkash and the plaintiff's uncle Nursingh Misser. The two brothers separated some time before 1871, and each received, on partition, a moiety of the mouzah in question.

After the plaintiff Ruder Perkash was born, the father Shib Perkash became indebted to the defendant No. 1, who acted as his banker from 1870. On the 3rd of September 1872 the defendant No. 1 brought a suit against Shib Perkash for the recovery of Rs. 6,939-2 as balance of the account to the close of the year 1279 (1872). A decree was obtained in this case on the 4th March 1873, and it having been put into execution, the property in dispute in this suit was attached on the 1st of April following. It was put up to sale on the 4th August of the same year, and was purchased by the decree-holder himself for Rs. 6,800.

On the 30th July, however, Shib Perkash had executed a deed of gift in favor of his minor son Ruder Perkash, the plaintiff in this suit, conveying his interest in the whole of the immoveable property, including Mouzah Singhole, belonging to the joint family, consisting of himself and his minor son, to the latter.

Upon an application made by Dhunnobutty Koer, the wife of Shib Perkash, and mother of the minor, Ruder Perkash, the District Judge of Bhaugulpore, on the 1st September 1873, directed the Collector of Monghyr to take charge of the whole of the estate of the aforesaid minor. The Collector accordingly took charge of the minor's estate, and appointed Abdul Wahub,

1879

RUDER PERKASH MISSER v. HURDAI NARAIN SAHU.

Statement.

who has brought the present suit on behalf of the minor I Perkash, as the manager thereof.

On the 14th August 1873, Shib Perkash instituted proce under section 256 of Act VIII of 1859 for the reversal o auction sale upon the grounds mentioned in his applicatio that date. The Subordinate Judge of Bhaugulpore, in w Court these proceedings were instituted, passed an order gra the prayer of Shib Perkash, and set aside the sale. The m having been brought up before a Division Bench of the High C the order of the Subordinate Judge was reversed, and the ceedings were remanded to him for new trial of the matte dispute. This took place on the 2nd of February 1874. proceedings going back to the lower Court, the Collecto Monghyr, on behalf of the minor Ruder Perkash, app through a duly constituted pleader, and although the nam Shib Perkash continued on the record, the whole co of the suit seems to have been taken up from that time by Collector on behalf of the minor. The Subordinate Judge, o 28th April 1874, dismissed Shib Perkash's application, holding the irregularities alleged by him in the conduct of the sale not established, and that having regard to the circumstance the property in dispute was sold subject to certain charge price paid for it was not inadequate. On appeal by Shib Pe the High Court coming to the same conclusions of fact u the order of the lower Court on the 27th of November 1874

On the 7th April 1877 the present suit was brought on b of the minor for the recovery of the whole 8 annas sha Mouzah Singhole, which was taken possession of by the d dant No. 1, on the 11th June 1874, under the color of his au purchase. The claim of the plaintiff is based upon the ground the defendant's auction purchase is invalid under the Mitak Law, which, according to the plaintiff's case, governs the fam

The suit was dismissed by the District Judge, upon the gr that under Mitakshara Law the plaintiff was not, in any entitled to recover the whole of the ancestral property durin lifetime of his father, and further that the property in questio been sold in execution of a decree for debts of the father, w had not been proved to be either illegal or immoral.

1879

RUDER PERKASH MISSER v. HURDAI NARAIN SAHU.

Argument.

The plaintiff appealed against the decision of the District Judge.

J. D. Bell (Officiating Advocate-General), and Baboo *Unnoda Prosad Banerjee*, for the Appellant.

Woodroffe, Mr. *R. E. Twidale*, and Baboo *Chunder Madhub Ghose*, for the Respondents.

J. D. Bell.—If the appellant, who comes in by gift, is in the same position as a son coming in by succession—and I can show that the debts of his father were contracted not only without necessity, but for immoral purposes—he will be entitled to have the whole property absolutely relieved from such debts.

If, on the other hand, I can show merely that there was no necessity, then the sale in execution must be set aside so far only as it affected the moiety of the joint estate to which the appellant was entitled—*Ram Sahai* vs. *Sheo Prosad Singh*, 4 C. L. R., (P. C.) 226; *Deendyal Lall* vs. *Jugdeep Narain Singh*, 1 C. L. R., 49; and *Roy Narain Dass* vs. *Nownit Lall*, 4 C. L. R., 67.

[MITTER, *J.*—In *Ram Sahai's* case the Court found also that the debts were immoral.]

(The learned Advocate-General here examined the evidence with a view to showing that the debts were contracted without necessity for immoral purposes.)

A son can compel his father to make partition of an ancestral immoveable property—*Laljeet Singh* vs. *Rajcoomar Singh*, 12 B. L. R., 273; *Raja Ram Tewary* vs. *Luchman Persad*, B. L. R., (P. B.) 731; *Kaliparshad* vs. *Ram Churn*, I. L. R., 1, All., 159; *Nagalinga Mudali* vs. *Subbiramaniya Mudali*, 1 Mad. H. C. R., 77; and *Moro Vishvanath* vs. *Gunesh Vithal*, 10 Bom. H. C. R., 444. So here the appellant is entitled at least to have the property partitioned as between him and his father or his judgment-creditor.

Baboo *Unnoda Prosad Banerjee* (on same side).—In the case of *Modhoo Dyal Singh* vs. *Kolbur Singh*, B. L. R., Full Bench, 1018, PEACOCK, *C.J.*, held that a son could not be compelled to refund the purchase money in the event of an alienation by his father

1879

RUDER PERKASH MISSER v. HURDAI NARAIN SAHU.

made without necessity, being set aside. Since then, however, the Privy Council have held, on principles of equity, that there could be no injustice in the purchaser being allowed to take the father's share—*Deendyal Lall* vs. *Jugdeep Narain Singh*, 1 C. L. R., 49; L. R. 4 I. A., 247.

Argument.

Here there is no equity in favour of the purchaser. He was the lender of the money, and knew the purposes for which it was employed, and the price paid at the auction sale for the property was less than one-tenth of the actual value of the property. An offer has been made to repay him the amount of principal and interest due upon the debt of the father.

Supposing the debt were recoverable after the death of the father, it is a mere personal debt, and, therefore, the joint property could not be sold in satisfaction of it. Besides, all that passed under the sale was the judgment-debtor's right and interest.

Woodroffe (for the Respondent).—In the first place, the present suit is not properly constituted. The District Judge had no power to make the order under section 12 of Act XL of 1858, directing the Collector to take charge of the estate on behalf of the minor, the interest of the minor in the joint estate not being capable of being taken charge of under the provisions of that Act—*Sheo Nundun Singh* vs. *M. S. Ghunsam Kooeree*, 21 W. R., 143; *S. M. Ajhola Kooeree* vs. *Baboo Digambur Singh*, 23 W. R., 206; and *Mussamut Gourah Kooer* vs. *Gunjadhur Purshad*, 4 C. L. R., 398.

Then I contend the deed is void against the creditors of Shib Perkash. The minor, on coming of age, might restore the property to his father.

It is also void under section 240 of Act VIII of 1859, as having been executed after the property in suit had been attached in execution of the defendant's decree.

The lower Court has not found that the deed is a genuine document even as between the father and son, but distinctly states (Paper Book, page 182) that when the issues were fixed, the pleader for the plaintiff repudiated the deed. The son, therefore, cannot claim now under that deed, yet it is the deed under which the Collector took possession under section 12 of Act XL of 1858.

1879

RUDHR PERKASH MISSER v. HURDAI NARAIN SAHU.

Argument.

The plaintiff has no right now to change his case. In the plaint the suit was based on the deed. Claiming under the gift it would be inequitable for the minor to obtain the assistance of the Court against the acts of the person from whom he accepted the gift.

If the deed is good as between the father and son, the property is no longer ancestral, and the considerations which apply to such property have no application here. The plaintiff is now the full owner, and could not demand partition from his father.

The finding in the proceedings instituted under section 256 of Act VIII of 1859, that the price realized at the sale in execution was not inadequate, and that there had been no material irregularity in the conduct of the sale, is binding upon the plaintiff, for on the remand the proceedings were conducted by the Collector on behalf of the infant; and, although the latter was not actually put on the record, he was fully represented.

It is unnecessary here to consider the right of a father as a member of a joint Hindu family to alienate a portion of the joint estate; for that question cannot arise, inasmuch as there has been no such alienation, that is, no voluntary alienation by Shib Perkash, to the respondent Hurdai Narain. The Privy Council in *Deendyal's* case distinguish between alienations effected by the Court, and by the father himself.

Although it lies upon the alienee, claming under an alienation by a member of a joint family, to prove that the alienation was justified by Hindu Law—*Bheknarain Singh* vs. *Januk Singh*, I. L. R., 2 Cal., 439—the *onus* lies upon the son in this case to show that the debts contracted by the father were immoral. His liability does not rest upon the question whether the debts were contracted for the benefit of the family or not—*Adurmoni Devi* vs. *Chowdhry Sib Narain Kur*, I. L. R., 3 Cal., 1; and *Muddun Gopal Lall* vs. *Mussamut Gourunbutty*, 15 B. L. R., 264, and 23 W. R., 365.

[MITTER, *J.*—Is there not a conflict between the case of *Bheknarian Sing* and that of *Muddun Gopal Lall?* In the former case WHITE, *J.*, says that the creditor was bound to show that the debt was contracted for family purposes, as well as that it was justified under Hindu Law.]

1879

RUDER PERKASH MISSIR v. HURDAT SARAFF SAHU.

I understand that case to support the other two cases just c

It is said that I am concluded by the case of *Deendyal* vs. *Jugdeep Narain Singh*, (L. R. 4 I. A., 247), but I con that the point in this case did not arise there. In that case only point was whether in Bengal an alienation by process of stood on the same footing as a voluntary alienation.

Argument.

[MITTER, J.—The question in this case does seem to l been raised there—see page 251.]

But in *Deendyal's* case counsel admitted that the whole es did not pass, and did not cite the case of *Muddun Thakoo Kunteo Lall*, L. R. 1 I. A., 321, where the Privy Co seem to have held that the whole estate did pass under execution sale. The Judicial Committee was not bound to de more than it was asked. Had the case of *Muddun Tha* been cited, the decision in *Deendyal's* case might have different.

[MITTER, J.—But the Privy Council in the more recent of *Ram Sahai* vs. *Shee Prasad Sing*, 4 C. L. R., 226, have up the principle laid down in *Deendyal's* case.]

The case of *Ram Sahai* is merely an authority for this position, that if a person who, either by reason of his b the execution-creditor, or by reason of his having notice of circumstances of the debt, is in the position of the execution-cred purchase property of a joint family in execution of a decre is only entitled to have transferred to him the share of member against whom the decree was obtained. It was unnecessary to go into the question of the nature of the although the Privy Council did consider the question.

[MITTER, J.—It did so because had the sons been liabl the debts, the whole property would have passed.]

I am entitled to contend on *Ram Sahai's* case that the oblig of the son to pay his father's debts is a sufficient answer to suit, unless it can be shown that the debts were immoral. events I am entitled to the share of Shib Perkash as if had been a partition.

According to Mithila Law which, I contend, applies in this the son has no right to partition in his father's lifetime, *Viveka Chintamni*, 231, P. C. Tagore's Edition,—but if the

is valid as between him and his father, such partition would of course be impossible. As purchaser, however, I am entitled to ask for partition on the authority of the cases of *Deendyal* and *Ram Sahai*.

[The following authorities were also quoted :—

Nugender Chunder Ghose vs. *S. M. Kaminee Dossee*, 11 Moore's I. A., 241 ; *Baijun Doobey* vs. *Brij Bhookun Lall Awasti*, L. R. 2 I. A., 275 ; and *Mahabeer Persad* vs. *Ramyad Sing*, 12 B. L. R., 90.]

Baboo *Chunder Madhub Ghose* followed on same side.

J. D. Bell, in reply :—

The decision of AINSLIE and BROUGHTON *J. J.*, in the case of *Gunesh Pandey* vs. *Dabee Doyal Singh*, 5 C. L. R., 36, shows that there is no such conflict between the Privy Council decisions as has been contended for by the other side.

The cases of *Deendyal* and *Ram Sahai* are conclusive in favour of the appellant, so far as his share in the property is concerned.

In the lower Court the deed by gift was repudiated, "except in so far as it went to establish the right of the Court of Wards to appear for the minor," and if the deed were a good gift as between Shib Perkash and his son, the property taken charge of by the Collector was not the interest of an infant in joint property. The objection, therefore, that the suit, is not properly constituted, is groundless.

The deed is not void as against creditors, for it provides for the payment of the father's just debts.

The question of *res judicata* cannot be relied on ; for the question at issue in this case could not have been raised in the former proceedings, while as a matter of fact the plaintiff was no party to these proceedings.

As to liability of son for his father's debts, see Mitakshara, Ch. VI, section 3, paras. 47-50.

The effect of the decision in *Ram Sahai's* case is, that although the son be liable for the debts of his father, yet so long as the father is in life, the father's property must first be sold in satisfaction before the creditors can come upon the son's share.

1879

RUDER PERKASH MISSER v. HURDAI NARAIN SAHU.

Judgment.

The judgment of the High Court (1), after setting out the facts as stated above, proceeded as follows :—

The case was tried in the original Court by the District Judge, who dismissed it upon the grounds that the plaintiff, under the Mitakshara Law, is not entitled to maintain this suit for the recovery of the whole of the ancestral property during his father's lifetime; and that the said property was sold in execution of a decree for the debts of the father which are not proved to be immoral or illegal.

On appeal it has been contended before us that the decision of the District Judge is wrong on both these points. But before we enter upon the question thus raised before us on behalf of the plaintiff, it may be as well to notice here several objections of law to the maintenance of the suit taken before us on behalf of the respondent.

The first contention is that the order of the District Judge, directing the Collector under section 12, of Act XL of 1858, to take charge of the property of the minor, is wrong ; and that, therefore, the present suit, having been brought by a manager on behalf of the minor appointed by the Collector, has not been properly framed. The objection is based upon the ground that the interest of a minor in a joint family estate, under the Mitakshara Law, is not such property as can be taken charge of by a manager appointed under the provisions of Act XL of 1858. This proposition is correct, as is shown by authorities which have been cited before us.

But nevertheless we do not think that this objection to the suit can prevail. In the first place, conceding that the order of the District Judge under section 12 of Act XL of 1858 was erroneous in law, it has become final, there having been no appeal against it. In the next place, we are of opinion that the ground upon which it has been assailed does not exist here. The property which was ordered to be administered by the Collector was not an interest of *a member of a joint family* governed by the Mitakshara Law. Whatever interest Shib Perkash had in the joint estate had passed to the minor by the deed of gift executed

(1) MITTER and TOTTENHAM, *J.J.*

in his (the minor's) favor, supposing that to have been a valid deed.

It has been said that the deed of gift in question is invalid, because the circumstances attending its execution clearly show that it has been set up to defraud creditors. But we think that it cannot be said to be a mere paper transaction transferring no title. Possession of the estate conveyed by it has been taken by the Collector on behalf of the minor under the direction of the District Judge. The circumstances surrounding the execution of this instrument lead to the inference that its object was to save the family estate from being ruined by the extravagance of the father, and not to defeat the just rights of the father's creditors, but rather to protect them; for the deed in fact provides for the payment of the father's just debts under the decree.

But conceding that the gift is void against the father's creditors, it is binding and operative between the parties to the instrument. Therefore, from the moment of its execution Shib Perkash ceased to have any joint interest in the family estate, and consequently the ground upon which the present contention rests does not exist in this case.

The next objection that has been raised on behalf of the respondent is, that the gift having been accepted on behalf of the minor Ruder Perkash, he is not competent to question the auction sale as a son under the Mitakshara Law, and his claim must stand or fall by the deed of gift. If Ruder Perkash had been of age, and had accepted the gift, we do not think, even then, he would have thereby forfeited or relinquished his rights as a Mitakshara son. He being a minor, there cannot be any doubt, that there is no force in this contention.

The last contention which has been put forward against the case being decided on its merits is that the plaintiff is precluded from questioning the validity and the effect of the respondent's own purchase; because he is bound by the final order passed in the proceedings taken by the father under section 256 of Act VIII of 1859, for its reversal. It has been said that after the aforesaid proceedings were remanded from this Court the hearing of the suit was taken up by the Collector on behalf of the minor, and that, therefore, although the name of Ruder

1879

RUDER PERKASH MISSER v. HURDAI NARAIN SAHU.

Judgment.

Perkash was not substituted on the record in place of his father, yet to all practical intents and purposes he was fully represented in it.

The present suit has been brought upon the ground that the property in dispute being part of a joint family estate, governed by the Mitakshara Law, could not be sold for the satisfaction of such debts of the father as were not binding upon the son. This question is wholly foreign to the matter which was the subject of enquiry in the proceeding instituted under section 266 of Act VIII of 1859. Therefore, supposing that for all practical purposes Ruder Perkash was a party to that proceeding, he could not have raised this point in it, and consequently he is not precluded from maintaining this suit by the decision passed in that proceeding upholding the respondent's auction purchase.

With reference to this proceeding another contention has been raised before us. It is to the effect that the finding arrived at then as to the adequacy of the price paid by the respondent for the auction purchase of the property in suit must be treated as final now. We shall deal with this question in its proper place.

Then, as regards the grounds upon which the lower Court has dismissed the suit, it seems to us that the District Judge is clearly wrong in holding that under the Mitakshara Law the plaintiff, during his father's lifetime, is not competent to maintain this suit for the whole of the share of the property in dispute, which belonged to the joint family. On the other hand, the suit would have been open to objection if he had brought it for an undivided share of the family property (vide *Rajaram Tewaree* v. *Luchmun Pershad*, 12 W. R., 478).

It is not absolutely necessary in this case to determine whether the debts, for the satisfaction of which Shib Perkash's property was sold, were of such a nature as would be binding upon the sons. It seems to us that what was sold in execution of the decree against Shib Perkash was simply his rights and interests in the disputed property; and that the present case is governed by the ruling of the Judicial Committee in *Deendyal Lall* v. *Jugdeo Narain Singh*, 4 L. R. I. A., 247. In that case Deendyal, a cre-

1879

RUDER PERKASH MISSER v. HURDAI NARAIN SAHU.

Judgment.

'oofani Singh, father of the plaintiff Jugdeep Narain, a money-decree under a bond executed by the father in particular family property was hypothecated as security ıan. Deendyal, instead of proceeding against the mort- 'operty, caused "the rights and proprietary interest and ree title and share of Toofani, the judgment-debtor," in oint family property to be put up for sale, and himself he purchaser. The plaintiff Jugdeep Narain sought to ıe property from the hands of Deendyal, who had taken n of it under his purchase. The District Judge of Gya rd the case on appeal from the judgment of the Subordi- ge of that district, found, as a fact, that the debts, for the ɔn of which the property in dispute in that case was e contracted by the father for necessary family purposes. ɔrdingly, reversing the judgment of the First Court, dis- he suit. On special appeal this Court (PHEAR and *J.J.*) held that what was sold was simply the *interest* of r in the joint property, and not the joint property itself, as such interest under the Mitakshara Law is not sale- hing passed to Deendyal by the auction sale. The claim was accordingly decreed. On appeal by Deendyal, ial Committee held that such interest, whether alienable the Bengal presidency, by voluntary alienation, is seiz- saleable in execution of a decree. The Judicial Com- ɔcordingly varied the decree of the High Court with the ɔn that Deendyal by auction purchase had acquired est of the father Toofani Singh in the particular joint operty which was the subject of the suit in that case, by virtue of that right he was entitled to enforce a so as to recover possession of the father's defined

ng to the question of "legal necessity for the loans," ial Committee observe (p. 251) :—"Whatever may be ships' opinion of the finding of the Zillah Judge upon y must, for the purposes of this appeal, treat it as The appeal is only from the order on special appeal, special appeal the High Court could not have dis- ding of the lower Appellate Court on this question

1879

RUDER PERKASH MISSER v. HURDAI NARAIN SAHU.

Judgment.

of fact, unless there was no evidence at all to support it. And this, whatever was the character and weight of the evidence, cannot be affirmed.

"This issue, however, seems to their Lordships to be immaterial in the present suit, because whatever may have been the nature of the debt, the appellant cannot be taken to have acquired, by the execution sale, more than the right, title, and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, *viz.*, the right, title, and interest of the father. If any authority be required for the proposition it is sufficient to refer to the cases of *Nugender Chunder Ghose* vs. *Sreemutty Kaminee Dassee*, and *Baijan Dobey* vs. *Brij Bhookun Lall Awasti*."

We think that the above observations clearly apply to the present case, and that on the strength of the authority of this case we are warranted in holding that the respondent before us acquired by the execution sale in this case only the interest of the father Shib Perkash in the disputed property.

Mr. Woodroffe very strongly urged on behalf of the respondent that the ruling of the Judicial Committee in *Muddun Thakoor* vs. *Kantoo Lall*, L. R., 1 Indian Appeals, p. 333, should govern this case, and contended that the decision of the Judicial Committee in *Deendyal Lall* vs. *Jugdeep Narain Singh* would not have been what it was if the ruling in *Muddun Thakoor* vs. *Kantoo Lall* had been brought to the notice of their Lordships of the Judicial Committee. That whatever may be the difficulty in reconciling the decisions in these two cases, and however slightly the authority of the case of Muddun Thakoor might have been weakened by the later decision in *Deendyal Lall* vs. *Jugdeep Narain Singh*, that authority has been fully set up again in the still later decision of the Judicial Committee in *Ram Sahai* vs. *Sheo Prosad Singh*, 4 C. L. R., p. 226.

We do not think that there is any conflict between the cases *Muddun Thakoor*, (L. R., 1 I. A., 321) and *Deendyal* (L. R.

1879

RUDER PERKASH MISSER v. HURDAI NARAIN SAHU.

Judgment.

I. A., 247). In a recent case—*Gunesh Pandey* vs. *Dabee Doyal Singh* (since reported in 5 C. L. R., 36), another Division Bench of this Court (AINSLIE and BROUGHTON, *J.J.*) has pointed out the distinction between these two cases. In the case of *Muddun Thakoor*, the father had mortgaged a certain joint property to a creditor who obtained a decree under the mortgage bond, and caused the mortgaged property to be sold in execution. These facts appear from the printed Privy Council record to which we have referred. Similarly in the case of *Ram Sahai*, the mortgaged property was put up to sale. In the first mentioned case the Judicial Committee held that the whole property passed to the purchaser, because he had no notice of the nature of the debts, supposing that they were such as would not be binding upon them. In the latter case the purchaser being fixed with a constructive notice as to the nature of the debts, for the satisfaction of which the property was sold, and it having been found concurrently by all the tribunals, including the Judicial Committee, that the debts were of such a nature as not to be binding upon sons, it was held that what passed by the sale was simply the interest of the father in the joint property.

There is no distinction between this case and that of *Deendyal*. There is nothing in the decree which the respondent Hurdai Narain obtained against the father Shib Perkash or in the proceedings taken in execution which would go to show that anything more than the interest of the latter was liable or actually sought to be sold.

The price paid by the respondent Hurdai Narain also tends to show that nothing more than the interest of the father was put up for sale. It is proved in this case that Rs. 1,816 is the gross rental of 8 annas of Mouzah Singhole. Allowing a deduction of ten per cent. (the highest rate) as collection charges and the amount of Government Revenue, *viz.*, Rs. 328-7, the nett profits of the said numbers amount to Rs. 1,307. Accepting that such properties as these are sold in this district at twenty years purchase as admitted by the defendant Hurdai Narain, the value would still amount to Rs. 26,140. The respondent has purchased the property for Rs. 6,800.

It has been said that it has been sold subject to prior charges.

1879

RUDER PERKASH MISSER v. HURDAI NARAIN SAHU.

Judgment.

These charges are :—(1) that the disputed property alo another mouzah was hypothecated in a bond, dated the 27t 1279, for Rs. 14,000; and (2) that it along with eleve mouzahs was similarly hypothecated in a bond, dated t April 1873, for Rs. 26,000.

Now, as far as the evidence adduced in this case goes, it that the hypothecation in the second of the above me bonds is invalid as against Hurdai Narain, because executed after the property had been attached in the exec his decree. No doubt a portion of the amount secured first mentioned bond, would be a burden upon the pro dispute. But still the price paid is inadequate for the 8 annas of Mouzah Singhole.

In the proceeding under section 256 of Act VIII of 1 was held that the price paid was not inadequate, and it h contended before us that this finding is binding upon th tiff in this case. But we do not think that this contenti any force, because the plaintiff in this case rests his case title quite independent of that of the father.

Upon all these grounds, we are of opinion that what w chased by the respondent Hurdai Narain was simply the i of the father Shib Perkash in the disputed property, and this view of the case it is not necessary to decide the q whether the debts, for which the respondent Hurdai obtained the decree, dated the 4th March 1873, against th Shib Perkash were binding upon the son Ruder Perkash.

We do not think that for the purpose of determining w interest of Shib Perkash is in the disputed property, the dent Hurdai Narain should be referred to a separate suit lowing the decision of this Court in Special Appeal N of 1877, decided on the 11th April 1878 (since reporte C. L. R., 26)—*Sumrun Thakoor* vs. *Chundermun Mis* think the matter may be enquired into and fully determ this suit. In that enquiry the mother of the minor is a sary party, and in her absence we refrain from expres opinion as to the contention raised before us that the being governed by the Mithila Law the father is entitl double share. In the lower Court the respondent Hurdai

1879

RUDER PERKASH MISSER v. HURDAI NARAIN SAHU.

Judgment.

ged that the family is governed by the Mithila Law, and re is nothing in the record which would go to show that he e up that contention. There is no difference between the akshara Law and the Mithila Law so far as the questions osed of by our present judgment are concerned. Therefore have treated the case with reference to those questions as if it governed by the Mitakshara Law. There may be some differ- between the two schools of Hindu Law as regards the stion of the father's share in a partition of ancestral property. upon that point, as we have already said, we express no ion now. For the purpose of disposing of that question we it the following issues for the determination of lower Court :—

. Is the family of the plaintiff governed by the Mithila or Mitakshara Law?

. If governed by the former law, whether Shib Perkash was eldest born son of his father, and what is his share in Mouzah hole?

the trial of these issues the mother of the plaintiff is a ssary party, and accordingly we direct her to be made a party ie suit.

e reserve the question of costs of this hearing.

[CIVIL APPELLATE JURISDICTION.]

1879 July 21st.

No. 586 of 1879.

IN THE MATTER OF RAM RUNJUN CHUCKERBUTTY BAHADOOR . . . . . } PETITIONER;

AND

RAM PROSHAD DASS . . . . . .

Sonthal Pergunnahs, Suits relating to land in—Jurisdiction—Act XXXVII of 1855, section 2—Act VI of 1871.

An officer in the Sonthal Pergunnahs, appointed by the Lieutenant Governor of Bengal under section 2 of Act XXXVII of 1855, although vested with powers of a Subordinate Judge under Act VI of 1871 has jurisdiction to try suits in regard to land, &c., where the value of the matter in dispute exceeds the value of Rs. 1,000.

RULE to show cause why an order dismissing the petitioner's suit on the ground of alleged want of jurisdiction should not be set aside.

Baboo *Mohiny Mohun Roy*, for Petitioner.

Baboo *Unnoda Prosad Banerjee*, *contra*.

The circumstances under which the suit was dismissed and the rule obtained sufficiently appear from the judgment of the High Court (1), which was as follows:—

This rule arises out of a suit instituted by the petitioner for possession of a share in a share in a talook valued about Rs. 1,000, in the Court of a Sonthal officer vested with the powers of a Subordinate Judge under Act VI of 1871. The suit has been dismissed on the ground that it has been instituted in a Court which has no jurisdiction to entertain it. The contention raised in this rule is that this decision of the lower Court is wrong, and the Court in which the suit in question has been instituted is the proper Court to hear and determine it.

The land in suit is situated within what are called the Sonthal Pergunnahs, and the question before us depends upon

(1) MITTER and TOTTENHAM, *J.J.*

construction of several Acts and Regulations as well as Government Notifications that have been passed and issued from time to time with reference to those Pergunnahs.

The earliest Legislature enactment on the subject is Act XXXVII of 1855, the first clause of which removed the Sonthal Pergunnahs, which were then principally within the local limits of the districts of Bhaugulpore and Beerbhoom, "from the operation of the General Regulations of the Bengal Code, and the laws passed by the Governor-General of India in Council" subject to certain provisions contained in a latter part of the Act. The Districts thus removed were "to be placed under the superintendence and jurisdiction of an officer or officers to be appointed on that behalf by the Lieutenant-Governor of Bengal." By section 11 of the Act in question the officer or the officers to be so appointed was or were vested with the administration of civil justice within the said districts subject to the proviso, "that all civil suits in which the matter in dispute shall exceed the value of one thousand rupees shall be tried and determined according to the General Laws and Regulations in the same manner as if this Act had not been passed."

From these provisions it is clear that the jurisdiction of ordinary Civil Courts was not taken away in respect of suits in which the matter in dispute exceeds the value of one thousand rupees.

On the 29th April 1872 a Regulation for the "peace and good government of the territory known as the Sonthal Pergunnahs" was passed by the Governor-General in Council under the powers vested in him by Act 33 Vic. Chap. 3, section 1.

Section 4 of this Regulation enacts that "the Lieutenant-Governor of Bengal in Council may, by a notification in the *Calcutta Gazette*, invest any competent officer in the Sonthal Pergunnahs with the powers of any Civil Court established under Act VI of 1871, and may exclude the whole or any part of the said pergunnahs from the jurisdiction of any of the Courts established under the said Act now having jurisdiction therein."

Section 5 provides that "till such time as a settlement of the whole or any part of the Sonthal Pergunnahs shall be made

1879

RAM RUNJUN CHUCKERBUTTY BAHADOOR v. RAM PROSHAD DASS.

Judgment.

under the rules hereinafter provided, and the said settlement sh be declared by a notification in the *Calcutta Gazette* to ha been completed and concluded, no suit shall lie in any Cou established under Act VI of 1871, in regard to any land, &c. "but such suits shall be heard and determined by the office appointed by the Lieutenant-Governor of Bengal under sectic 2 of the said Act XXXVII of 1855, or by the settlement office hereinafter mentioned, according as the said Lieutenant-Gove nor shall from time to time direct."

The land in suit in this case is situated in the Sonthal Pe gunnahs, the settlement of which has been completed, but it h not yet been notified in the *Gazette* as completed and conclude The officer in whose Court the suit was instituted is an offic appointed by the Lieutenant-Governor of Bengal under sectio 2 of Act XXXVII of 1855.

By a notification, dated the 7th May 1872, it was directed b the Lieutenant-Governor that until further orders, the officers c the Sonthal Pergunnahs, appointed under section 2, of Ac XXXVII of 1855, shall entertain and adjudicate suits for lan under section 5 of the above-cited Regulation.

By another notification, dated the 4th August 1873, issued b the Lieutenant-Governor under the power vested in him by sec tion 4, of the aforesaid Regulation, the jurisdiction of the Civ Courts of Beerbhoom and Bhaugulpore, in respect of suits i which the matter in dispute exceeds one thousand rupees, wa taken away, and the Sonthal officers in charge of sub-divisio were vested with the powers of a Subordinate Judge, as de cribed in Act VI of 1871, and the Deputy Commissioner i charge of the District, who is also a Sonthal officer, was veste with the powers of a District Judge as described in the afor said Act.

Mr. Smith, who is a Sonthal officer appointed by the Lieut nant-Governor, and who has been, by the notification referred above, vested with the powers of a Subordinate Judge, h dismissed the suit, holding that under section 5 of the Regulati of 1872, quoted above, he has no jurisdiction to entertain without a certificate from a settlement officer. We think th he is quite mistaken in the view which he has taken of sectio

1879

RAM RUNJUN CHUCKERBUTTY BAHADOOR v. RAM PROSHAD DASS.

Judgment.

of the aforesaid Regulation. Under this section the jurisdiction of the Courts *established* under Act VI of 1871, in respect of suits for land, &c., within pergunnahs of a particular description is taken away. The Court over which Mr. Smith presides, and in which the present suit was brought, is not a Court *established* under Act VI of 1871. It is the Court of a Sonthal officer vested with the powers of a Subordinate Judge as described in that Act. Then again the section in question further provides that such suits shall be heard and determined by the officers appointed by the Lieutenant-Governor of Bengal, under section 2 of the said Act XXXVII of 1855, or by the settlement officers, hereinafter-mentioned, according as the said Lieutenant-Governor from time to time directs." Now, by the notification of the 7th May 1872, already referred to, the Lieutenant-Governor has directed that such suits shall be heard and determined by the Sonthal officers appointed under section 2 of Act XXXVII of 1855, of whom Mr. Smith is one, and he is none the less so by reason of having been invested with the powers of a Subordinate Judge. It is clear, therefore, that Mr. Smith has full jurisdiction to entertain this suit. We accordingly set aside his order, dismissing this suit for want of jurisdiction, and direct that he do proceed with the trial.

The rule being made absolute, the petitioner is entitled to recover the costs of this Court.

[CIVIL APPELLATE JURISDICTION.]

1879
August 5th.

No. 1668 of 1878.

ISHAN CHUNDER ROY AND OTHERS (PLAINTIFFS) . . . . . } APPELLANTS;

AND

BUSARUDDIN (ONE OF THE DEFENDANTS) . RESPONDENT.

Act VIII (B. C.) of 1869, *section* 37—*Measurement of Lands—Co-sharers—Notice of intended measurement.*

The words "the person claiming the right to measure" in section 37, of Act VIII (B.C.) of 1869, must be read as implying the sole proprietor or whole body of proprietors of the land for the measurement of which application is made.

Where, therefore, there are joint proprietors, the notice of an intended measurement of the lands must be a notice of all the joint proprietors. It is not sufficient that one co-sharer should give notice, and make his co-sharers parties to the suit.

See *Santee Ram Panjah* vs. *Bykunt Parya*, 19 W. R., 280; *Peare Mohun Mookerjee* vs. *Raj Kristo Mookerjee*, 20 W. R., 385; and *Moolook Chand Mundul* vs. *Modhoosoodun Bachusputty*, 16 W. R., 126.

APPEAL from the decision of the First Subordinate Judge of Tipperah, affirming the decree of the Moonsiff of Kusba, Nurnagur.

Baboo *Troilukhya Nath Mitter*, and Baboo *Bussunt Kumar Bose*, for the Appellants.

Baboo *Sreenath Banerjee*, for the Respondent.

The facts are sufficiently set forth in the judgment of the High Court (1), which was as follows :—

The plaintiff, who is a part proprietor of a certain estate brought this suit to establish his right to measure the land which were in the possession of the tenant-defendants. He alleged that he had served a notice upon them requiring them to be present on the occasion of the measurement, but that they had failed to attend and point out the lands.

(1) MORRIS and PRINSEP, *J.J.*

1879

ISHAN CHUNDER ROY v. BUSARUDDIN.

Judgment.

The defendants resisted the right of the plaintiff, alleging, *first*, that the plaintiff was only a part owner of the talook: and *second*, that no notice had been served upon them.

Subsequent to the written statement of the defendants having been put in, the plaintiff applied to the Court, and obtained the order of the Court to make the co-sharer proprietor a party defendant to the suit.

The lower Appellate Court, in concurrence with the first Court, following the rules laid down in the case of *Santee Ram Panjah* vs. *Bykunt Parya*, 19 W. R., 280, and the case of *Pearee Mohun Mookerjee* vs. *Raj Kristo Mookerjee*, 20 W. R., 385, dismissed the plaintiff's suit, holding that the plaintiff as co-sharer of the mehal could be permitted to measure the lands without the consent of the other co-sharer.

In special appeal it is urged that the present case differs materially from the cases reported in 19 and 20 W. R., inasmuch as in none of those cases was the co-sharer proprietor a party to the suit; that in those cases a part proprietor alone brought the suit to establish his right against the tenant-defendants; and that his case was rejected, inasmuch as he could not be treated as sole proprietor of the estate. Our attention has been directed to the case of *Moolook Chand Mundul* vs. *Modhoosoodun Bachusputty*, 16 W. R., 126. That, too, was a case in which a part proprietor sued to establish his right as against the tenant-defendants to measure the lands comprised in the estate without making his co-sharers parties to the suit. But Mr. Justice LOCH threw out the observation that, "possibly, if a person's co-sharers refused to join in making an application to the Collector, they might be made parties to the case, and the measurement, &c., proceed in the presence of all parties, and so the tenants be preserved from the harassment arising from separate measurements being frequently made by the various shareholders." It is contended that here the co-sharer proprietor has been made a party to the suit, and, therefore, the Court, having all the parties before it, is not prevented from dealing with the rights of the parties, and determining whether the lands can be measured or not. We are not prepared to say that there are not cases in which co-sharer proprietors being made

1879

ISHAN CHUNDER ROY v. BUSARUDDIN.

Judgment.

parties to the suit, the right of the plaintiff to measure tl lands may not be determined. But we think that under tl special circumstances of this case it is unnecessary to determi this point. It seems to us that here there is no cause of actio upon which the suit can be founded. It is clear that the word "the person who has the right to measure," that is to say, th proprietor of an estate as described by Mr. Justice AINSLIE i the decision in 16 *Weekly Reporter*, must be read as implyin the sole proprietor or whole body of proprietors of the whol of the land for the measurement of which application is made When, therefore, such proprietor is desirous of measuring land and finds it necessary to serve notice upon the tenant, it is clea that if the proprietary consist of two or more persons the notic must be the notice of such two or more persons. In the presen instance there is no question that the notice was one signed and presented by the plaintiff alone. The co-sharer proprietor wa no party to it. We think, therefore, that no cause of actio arose upon the failure of the defendant to comply with th terms of the notice, and, therefore, the suit was bad, and ough upon that ground alone to be dismissed accordingly. Withou expressing an opinion on the reasons assigned by the lowe Courts, we concur with them in thinking that the suit must b dismissed. It is unnecessary to touch upon another point whic was raised, and on which the suit was considered entitled to b dismissed, namely, the question of title. It is sufficient for th purposes of this appeal to dismiss the suit on the one ground that the notice being bad the plaintiff had no cause of action.

The appeal is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

MINU SIRKAR AND OTHERS (PLAINTIFFS) . APPELLANTS ;

AND

RHEDOY NATH ROY AND OTHERS (DEFENDANTS) . . . . . } RESPONDENTS.

1879
August 11*th*.

No. 1592 of 1878.

Evidence Act (*I. of* 1872), *section* 90—*Document* 30 *years old*—*Presumptions.*

In applying the presumption allowed by section 90 of the Indian Evidence Act, the period of 30 years is to be reckoned, not from the date upon which the document is filed in Court, but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof.

APPEAL from a decision passed by the Officiating Judge of Rajshahye, reversing the decree of the Moonsiff of Shahazadpur.

The plaintiffs in this case sued to establish their title as based upon a pottah, dated 15th Bysack 1254, propounded by them, and after establishment of their title for possession of certain lands specified, from which they alleged that they had been ejected by the defendants in 1277.

The plaint was filed on the 10th February 1877, and along with it, the pottah upon which the plaintiffs relied. The suit was not heard until the 30th July following.

The Moonsiff before whom it was heard found that the pottah was established as a document 30 years old. On appeal, however, the District Judge reversed this finding, on the ground that, although on the date of hearing the pottah was 30 years old, it was not so when filed in the suit. Being of opinion that the period of 30 years was to be calculated from the date of the document being filed, and not from the date upon which it is necessary to decide as to its genuineness or otherwise, he refused to make in favor of the pottah the presumption allowed by section 90 of the Evidence Act.

1879

MINU SIRKAR v. RHEDOY NATH ROY.

He accordingly reversed the decision of the lower Court upon this and other grounds.

The plaintiffs appealed.

Judgment.

Baboo *Sreenath Dass*, and Baboo *Ishur Chunder Chuckerbutty* for the Appellants.

Baboo *Mohiny Mohun Roy*, and Baboo *Kishory Mohun Roy*, for the Respondents.

The judgment of the High Court (1) was as follows :—

The plaintiffs brought this suit on the basis of a lease bearing date the 15th Bysack 1254, to recover possession of a certain mokurraree jote. The First Court gave the plaintiffs a decree holding that the pottah was established. But the lower Appellate Court, on appeal, disallowed the presumption arising from the fact of the document being 30 years old. The lease was filed in Court two months before the 30 years had expired, hence the Judge says :—" When it was filed in this case it was not 30 years old. To allow the delay of the Court in hearing the case so to work that the defendants accept the document against them without the ordinary proof would be a violation of the known principle that the action of the Court is injurious to no one." The Judge then goes on to say : " I would hesitate to extend to it the presumption admissible in connection with documents of the age. Its appearance is, in my judgment, strikingly against it being of the age alleged. It was once before filed in Court, but when returned it was returned as a document which bore no date." " The *ex post facto* filling in of the date indicates clear dishonesty in connection with the date. I, therefore, refuse to document the presumption of section 90 of the Indian Evidence Act."

On the first point we think that the Judge is in error. It appears to us that the period of 30 years is to be reckoned from the date on which the document is put into Court, but from the date on which having been tendered as evidence its genuineness or otherwise becomes the subject of proof. It is not

(1) MORRIS and PRINSEP, *J.J.*

1879

MINU SIRKAR v. RHEDOY NATH ROY.

Judgment.

the case comes on for hearing, and the party producing it is called upon to prove it, that the Court after being satisfied that it comes from proper custody can be asked to make the presumption allowed by section 90 of the Indian Evidence Act.

On the second point we think that the Judge has probably made an error of fact, and he has certainly placed the plaintiffs, appellants, at a disadvantage. In coming to the opinion that the document bore no date when it was returned in 1876 to the vakeel Grish Chunder Roy, the Court acted upon the application which that vakeel tendered on the part of one Ameer Sirkar. It would be seen that in 1859 in a case tried before arbitrators, this document, the property of Judo Sirkar, was filed together with two documents, a pottah and a dakhilla, the property of one Ameer Sirkar. In the application which Ameer Sirkar made for the return of these three documents he mentioned the year of the execution of the pottah of Judo Sirkar, but not the month or date. The Judge accepted this application as evidence, although it had not been before the First Court, and drew from it the conclusion that the pottah originally bore no date. It seems to us, however, first, that he ought not to have accepted this additional evidence at all until he had recorded his reasons for so doing; and second, that he ought to have given the parties an opportunity of challenging the conclusion to be drawn from the application of Ameer Sirkar, and of producing evidence to show that the instrument of lease originally bore the date which appears on the face of it. It is clear that the application of Ameer Sirkar cannot in any way bind Judo or Judo's descendants, nor can Judo or his descendant be held liable for any omission of date which Ameer Sirkar may happen to have made. For it has been suggested, and is by no means improbable, that Ameer Sirkar being authorised by Judo to get back his document for him, made his application through the vakeel describing it only in general terms, whereas in describing his own documents he gave specifically the year, month, and date of execution.

Another argument has been addressed to us that the First Court found upon the evidence that the plaintiffs have been in possession for many years subsequent to the year 1254, and a right of occupancy accrued to them, and that consequently the Judge on

1879

MINU SIRKAR v. RHEDOY NATH ROY.

Judgment.

appeal, even if he found the pottah to be not proved, should have allowed them to recover possession on the strength of that right. We think, however, that inasmuch as there was no alternative application of this kind, and no reference to the right was made in the plaint, and consequently no issue raised on the point, we cannot now take it into consideration in special appeal. The judgment of the lower Appellate Court is therefore set aside, and the case remanded for retrial. The Judge will deal with it on its merits, having discarded from his mind the considerations which led him to refuse to give to the pottah set up by the plaintiffs the presumptions allowed by section 90 of the Evidence Act.

[CIVIL APPELLATE JURISDICTION.]

Aug. 30*th.*

No. 227 of 1877.

SHEO PERSHAD SINGH (PLAINTIFF) . . APPELLANT;

AND

KALLY DASS SINGH AND OTHERS (DEFENDANTS) . . . . . } RESPONDENTS.

Regulation XLIV of 1793, *Leases granted during existence of—Regulation VIII of* 1819, *Leases existing at time of passing of—Leases whether for life or in perpetuity—"Mocurrari ijarah."*

In 1798, lands were granted by the zemindar to R for the purposes of cultivation and improvement under a document described as a "mocurrari ijarah" for a term of four years at Rs. 6 per annum, and then at a uniform rate of Rs. 25 per annum. It was stipulated that the grantee should not dispose of any portion of the lands without the permission of the grantor. Up to 1819, the lease was treated by the parties as a vaild existing lease, and it continued to be so treated until the death of R in 1875.

Held, that the lease must be construed as a lease for the life of R only and not in perpetuity, and that the zemindar was entitled to possession on R's death.

The use of the word "*mocurrari*" raises no presumption that the lease was intended to be hereditary, but in order to see whether it was so intended, it is necessary to look to the terms of the instrument itself and the circumstance under which it was made.

Regulation XLIV of 1793 was intended to apply to leases which might have been avoided by the grantor or his heirs during the time the Regulation was in force, but which had been acted upon by the parties after the expiration of ten years, and were treated and considered as in existence at the time of the passing of Regulation VIII of 1819.

1879

SHEO PERSHAD SINGH v. KALLY DASS SINGH.

Statement.

REGULAR APPEAL against the decision of the First Subordinate Judge of Bhaugulpore.

This was a suit to resume and obtain khas possession with mesne profits of Mouzah Bhalwana, in the zemindary of the plaintiff.

The plaintiff's ancestor, Rajah Gopal Singh, on the 28th Kartic 1206 Fusli (corresponding with November 21st, 1798), granted a lease of this mouzah to one Roghoo Nath Singh, the father of three of the defendants.

The lease, which was described as a mocurrari izarah pottah, fixed the rent to be paid at the rate of Rs. 6 per annum for 4 years, and then at a uniform rate of Rs. 25 year after year. The lease was said to be for the purpose of cultivation and improvement. It was also provided that the lessee should not have power to dispose of a single span of land in the mouzah without permission of the grantor.

It seems that Roghoo Nath disposed of portions of the land during his life to certain persons, who have been made defendants to the suit. Upon the death of Roghoo Nath, on the 24th of July 1875, the plaintiff sought to enter into possession, alleging that the lease determined upon the death of the lessee. Resistance having been made, proceedings were taken under section 530 of the Criminal Procedure Code, the result being that portions of the lands were placed under attachment, and the remainder allowed to be retained by certain of the defendants.

This suit was thereupon filed on the 22nd August 1876, with a view to establishing the plaintiff's right.

It appears that upon the death of Rajah Gopal Singh, who granted the pottah, his son, Rajah Jeswant Singh, declined to receive rent of this mouzah from Roghoo Nath under the pottah in question, contending that one Delal Singh, who was Roghoo Nath's uncle and guardian, had surrendered that pottah to Rajah Gopal Singh, and had taken from him another ticca pottah on behalf of Roghoo Nath at a rent of Rs. 51, and for a term of eleven years. In the proceedings which were taken in 1816 to try that question, Roghoo Nath was successful, the Judge considering that Roghoo Nath held the property under the pottah of 1798.

1879

SHEO PERSHAD SINGH. v. KALLY DASS SINGH.

Argument.

The same point was afterwards raised in a regular suit by Nawab Singh, the successor of Rajah Jeswant Singh. He ag 1826 sued Roghoo Nath under the alleged eleven years' lea the rent of Rs. 51, and in that case Roghoo Nath set up the of 1798. In the first Court the Rajah was successful, b appeal to the Judge the decision was reversed, and Roghoo was adjudged to hold under the mocurrari pottah. It do appear, however, that the question of the validity of, or the for which the lease should last, was there decided.

The Subordinate Judge held the lease conferred an est perpetuity upon Roghoo Nath and his heirs, and accor dismissed the suit.

The plaintiff appealed against that decision, on the g that the mocurrari was void under Regulation XLIV of except for a period of ten years, or, if not void, that it enure only for the lifetime of the grantee.

Woodroffe (with him Baboo *Annoda Persad Banerjee*) fo Appellant.

J. D. Bell (Officiating Advocate-General), *Phillips,* *Taruck Nath Paulit,* and Baboo *Mohesh Chunder Chowdhr* the Respondents.

Woodroffe.—Under Regulation XLIV of 1793, section 2, m raridars were precluded from making any settlement for a exceeding ten years.

Now when that Regulation was passed, it was the intenti the Legislature that the mocurraridars, although their settle with the Government might become permanent (see Regu VIII of 1793, section 3), should not have the power of m perpetual leases.

[GARTH, *C.J.*—Then what do you make of section, 6, gives power to any zemindar or independent taluqdar to di of any part of his lands as a dependent taluq ?]

There is nothing contradictory in that section, for while could not be granted for longer than ten years, the period settlement with the Government, there is nothing to preven zemindar from splitting up his zemindary into dependent t

What is a dependent taluqdar is explained in section 48 of Regulation VIII of 1793; and section 51 of the same Regulation provides for enhancement of rent of such taluqs.

Regulation XLIV of 1793 was re-affirmed by Regulation L of 1795, and extended to Behar by a subsequent Regulation.

The position of mocurraridars remained thus until Regulation 7 of 1812 was passed to rescind the clause taking away the power of zemindars of granting leases for a term exceeding the period of their settlement.—See preamble to the Regulation.

There is no provision making that Regulation retrospective.

Such then being the state of the law when the mocurrari which we have to deal with in this suit was granted, as zemindar I have now a *primâ facie* right to possession which can only be defeated by the defendant setting up a valid intermediate tenure created between 1797 and 1812.

The preamble to Regulation VIII of 1819 shows clearly that under Regulation V of 1812 it is not to be supposed that a man had power to make a lease for a period longer than his own tenure.

[GARTH, *C.J.*—That preamble recites that prior to the Regulation of 1812 it had been a common practice in Bengal for leases and grants of taluqs to be made at a rent fixed in perpetuity.]

[Mr. *Woodroffe* was here stopped, and the Advocate-General called upon for the respondents as to the point here raised.]

J. D. Bell, (Officiating Advocate-General.)—This particular lease was established as a valid existing mocurrari in the Court of the Judge of Bhaugulpore on 8th February 1816, and again on the 9th January 1826. The decisions do not determine whether it could enure beyond the life of Roghoo Nath Singh, the grantee. But it is submitted that so far as the question as to the validity of the lease is concerned the matter is now *res judicata*.

[GARTH, *C.J.*—Suppose we consider the lease absolutely illegal at being made contrary to law, can we possibly find that it is a good lease as a mocurrari?]

Certainly, for I submit that it has already been held to be valid as a mocurrari, and that that question is now *res judicata*.

1879

SHEO PERSHAD SINGH v. KALLY DASS SINGH.

Argument.

Regulation VIII of 1819 is confirmatory of the l Had this lease been intended to be for a term exceeding years it would have been bad in its inception, but it was a l in consideration of the grantee making improvements, for years, and then year by year at a fixed rent.

[GARTH, *C.J.*—That is contrary to the provision of secti Regulation VIII of 1793. It was not a lease which the zemi could or could not confirm. That provision in Regulation of 1793 was on the ground of public policy. The lease, it s to me, was bad from the beginning.]

Whatever the policy of the Government was in 1793 Government in 1812 granted power to zemindars to grant l for any length. We must take it, therefore, that in 1812 Government had ascertained that no injury had been done b creation of such a lease as the present. Suppose, then, t lessee were in upon such a lease as the present under a zemi in 1812, and continued to hold on, I take it that a Cou law in judging of his position would look at the lease adm by both parties to exist.

Then, again, this lease lasted until 1819, when a Regul was passed (VIII of 1819) declaring valid leases fixing rei perpetuity, or for a longer period than ten years, though exe while section 2, Regulation XLIV of 1793, was in force.

Admitting, as the plaintiffs say, that this was a lease grante the life only of the grantee, it was in existence in 1819, section 2, Regulation VIII of 1819, declares valid "any leas engagements for the fixing of rent now in existence, that have been granted or concluded for a term of years, c perpetuity."

[GARTH, *C.J.*—But section 2 of Regulation XLIV of declared all such leases as the present absolutely null and Could it have been said in 1811, that this lease was in existe

It was not then enforceable, but being recognized b parties themselves it was in existence.

[GARTH, *C.J.*—But it was only leases which Courts o could enforce that were saved by the later Regulation.]

I contend, the Legislature meant to recognize any such l which the parties considered binding in 1819.

1879

SHEO PERSHAD SINGH v. KALLY DASS SINGH.

Argument.

The acceptance of rent for forty years was held to ratify the ginal grant of a mocurrari pottah granted prior to Regula- I V of 1812—*Umritnauth Chowdhry* vs. *Koonjbehary Singh*, R., F. B. No., p. 34—see also *Kuroonakur Mahotee* vs. *Neela- Chowdhry*, 14 W. R., 107.

a the case of *Baboo Lekhraj Roy* vs. *Kunya Singh*, L. R., 4 . 223, a lease dated 1808 was recognized.

Woodroffe.—The lease in the last case cited was "to continue ng the term of my mocurrari," so that it was a valid lease in nception.

he cases decided by the Bhaugulpore Court were in suits as ceptance of rent only.

here can, therefore, be no question of *res judicata* here, for question whether the lease was void was ever raised—see *rga Persad Singh* vs. *Doorga Koonwari*, I. L. R, 4 Cal., 190. Privy Council case decided on the principle of *Barrs* vs. *son*, 1 Y. and C., 585.

The Court here intimated to Mr. Woodroffe that it was pre- d to decide the case, on the ground of the original invali- of the lease, in favour of his client, but Mr. Woodroffe, inas- h as the case might be appealed to the Privy Council, con- ed it inadvisable to rest his case entirely upon that point.)

Woodroffe.—Assuming then that the lease was not void, I will r myself to the question whether the parties intended to grant rpetual mocurrari or not. The grantor cannot be taken ve intended what was contrary to law.

e *onus* rests upon the defendant to show that this is a trans- le and perpetual tenure.

e rule is that if a grant is of an ambiguous character it must ken as for life only—*Baboo Lekhraj Roy* vs. *Kunhya Singh*, , 4 I. A., 223.

Ameeroonnissa vs. *Maharaja Hetnarain Singh*, S. D. A., page 648, the words used in a grant were *istemrari* , but it was held that the lease did not convey any ary right; see *Sorobur Singh* vs. *Rajah Mohendernarain* S. D. A., 1860, p. 577; see also *Rajah Modenarain* *Kantlall*, S. D. A., 1859, p. 1572; *Government* vs. *Nawab Jafar Hossein Khan*, 5 Moore's I. A., p.

1879

SHEO PERSHAD SINGH v. KALLY DASS SINGH.

Argument.

498; *Rajah Lilanund Singh* vs. *Thakur Munorunjun Singh*, 13 B. L. R., p. 133, in appeal from decision in 3 W. R., 101. The decision of *Mussamut Laku Kowar* vs. *Roy Hari Krishna Singh*, 3 B. L. R., 226, is perhaps in conflict with the last case. Here, however, the word *istemrari* is not used, and *à fortiori*, the lease cannot be hereditary. According to the case of *Baboo Dhunput Singh* vs. *Gooman Singh*, 11 Moore's I. A., 433, a grant of an indefinite character is for life only. (See pages 463, 465).

This lease is called a mocurrari ijarah, but it was a farming lease or jungle booree lease (see Regulation VIII of 1793, section 8), not liable to enhancement, and therefore so called. As to jungle booree tenures, see *Rajah Monmohun Singh* vs. *Watson*, 2 Hay, 398.

J. D. Bell.—The lease was for a term of four years, and could not have been resumed had the grantee died within that period—*Maharajah Tej Chund Bahadoor* vs. *Sri Nauth Ghose*, 3 Moore's I. A., 261. This is inconsistent with its being a lease for the life of the grantee.

There is no necessity for words of inheritance in a grant among Hindus.—*S. M. Anundomohey Dossee* vs. *Doe d. E. I. Company*, 8 Moore's I. A., 43; see *Mussamut Lakhee Kowar* vs. *Roy Hari Krishna Singh*, 3 B. L. R., 226.

[GARTH, *C. J.*—There is no necessity for the words istemrari; for a lease without any words cutting it down would be a lease in perpetuity.]

Phillips (on same side) :—

Considering that the Government itself had set the example of granting only perpetual leases, it is probable the zemindars followed that example, and that the grantor here, in using the word mocurrari, meant a perpetuity.

In the case of *Government of Bengal* vs. *Nawab Jafar Hossein Khan*, 5 Moore's I. A., the Privy Council, at page 498, intimated that the word mocurrari might import perpetuity.

In the *Tagore* case (9 B. L. R., 377), it was said that an estate granted without words of inheritance would pass an inheritance, see *Bhoobun Mohini Debya* vs. *Hurrish Chunder Chowdhry*, L. R., 5 I. A., 138. No inference can be drawn

against us from the fact that no *bonus* was given for the lease, for the lands were jungle lands.

If the lease was taken benami, as it is said to have been, it clearly could not have been intended to have been a lease for the grantee's life.

Woodroffe in reply.—The cases cited by Mr. Phillips do not apply. There is no analogy between grants of land and leases. The grantor of a lease retains a proprietary right in the land.

The Privy Council has in no case held that a lessee takes an estate of inheritance where the lease does not contain words of inheritance, unless there has been a long series of descents evidencing an intention on the part of the grantor that the grant was intended to have been hereditary.

It is said the lands leased were jungle lands, but there is no evidence of this. The lease speaks of abkari, toddy, gunjes, bazars, hauts, lakheraj lands, &c., &c.

The fact that no *bonus* was paid is very important—*Baboo Prosonokoomar Tagore* vs. *Ram Mohun Doss*, S. D. A., 1855, page 16.

As to the use of the word *ticca* in this lease see *Nuffar Chunder Shaha* vs. *Gossain Jysingh Bharuttee*, 3 W. R., Act X Rul., 144.

Again in the present case we have a prohibition against alienation without permission, which clearly negatives any intention that the lease should be transferable or hereditary.

The following judgment was delivered by the Court (1) :—

This is a suit brought by the plaintiff Rajah Sheo Pershad Singh, (who is the son and heir of Sir Maharajah Joy Mungul Singh), to recover, from the defendants, possession of an estate called Mouzah Bhalwana, Pergunnah Ghidhour, and also mesne profits from the commencement of the suit.

It appears that Mouzah Bhalwana is a part of the plaintiff's ancestral zemindary, and that Rajah Gopal Singh, one of the plaintiff's ancestors, granted to Roghoo Nath Singh, the father of the defendants Nos. 5, 6, and 7, a mocurrari ijarah of the said

(1) GARTH, *C.J.*, and PRINSEP, *J.*

1879

SHEO PERSHAD SINGH v. KALLY DASS SINGH.

Judgment.

mouzah, by a pottah dated the 28th Kartic 1206 Fusli (answering to the 21st November 1798.)

Roghoo Nath Singh disposed of portions of the property during his life to certain persons, who are now represented by the defendants of the 1st and 2nd parts; and he died on the 6th of Srabun 1282 Fusli (answering to 24th of July 1875.)

Upon his death the plaintiff as the owner of the zemindary attempted to take possession of the mouzah, but he was opposed by the defendants of the 1st and 2nd parts, and proceedings were then taken under section 530 of the Criminal Procedure Code, the result of which was that by an order of the Magistrate, the mouzah was placed under attachment. This order was so far modified by the High Court that twelve annas of the property were restored to the possession of the defendant 1st party, the remaining four annas still continuing under attachment.

This suit was then brought by the plaintiff, upon the ground that the mocurrari ijarah was only granted for the life of Roghoo Nath Singh; whilst the defendants, on the other hand, contend that the mocurrari was transferable and hereditary, and that Roghoo Nath, his heirs and assigns were entitled to it in perpetuity.

The Subordinate Judge held that the mocurrari conferred an estate in perpetuity upon the grantee and his heirs capable of alienation, and he has accordingly dismissed the suit.

On appeal to this Court, it has been in the first place contended that the mocurrari was void under Regulation XLIV of 1793, except for a term of ten years; and that after the expiration of that term, (that is to say in 1808), the tenancy became an annual one, which terminated in 1875 on the death of the grantee.

Regulation XLIV of 1793, section 2, declares that "no zemindar shall grant pottahs to ryots or other persons for the cultivation of lands for a term exceeding ten years," and further "that every pottah which has been or may be granted in opposition to such prohibitions shall be null and void." This was repealed by Regulation V of 1795, section 2; but Regulation XLVII of 1803 declares such leases to be null and void, "so *as far as respects its jumma or rent thereby illegally stipulated,*

without affecting any other rights which the parties may respectively possess or to which they may be entitled."

These Regulations were followed by Regulation V of 1812, section 2 of which declared that "proprietors of lands should be competent to grant leases for any period which they might deem most convenient to themselves and tenants, and most conducive to the improvements of their estate."

Thus the prohibition against granting leases for terms exceeding ten years was removed; but no provision was made for rendering valid those leases which had been granted in violation of the prohibition, whilst it remained in force; such, for instance, as the mocurrari lease in the present case.

In order to remedy this omission, Regulation VIII of 1819 was passed.

The preamble to that Regulation, after reciting the previous Regulations upon the subject, proceeds thus: "In practice the grant of talooks and other leases at a rent fixed in perpetuity had been common with the zemindars of Bengal for some time before the passing of the two Regulations (V and XVIII of 1812) last mentioned; but notwithstanding the abrogation of the rule, which declared such arrangements null and void, and the abandonment of all intention or desire to have it enforced as security for the Government revenue in the manner originally contemplated, it was omitted to declare in the rules of Regulations V and XVIII of 1812 or in any other Regulations, whether tenures in existence and held under covenants or engagements entered into by the parties in violation of the rule of section 2, Regulation XLIV of 1793, should, if called in question, be deemed invalid and void as heretofore. This point it has been deemed necessary to set at rest by a general declaration of the validity of any tenures that may now be in existence, notwithstanding that they may have been granted at a rent fixed in perpetuity, or for a longer term than ten years, while the rule fixing their limitation to the time of any such engagements, and declaring null and void any granted in contravention thereof, was in force."

This being the preamble, section 2 of the Regulation declared, in effect, that any such leases then in existence which may have been

1879

SHEO PERSHAD SINGH v. KALLY DASS SINGH.

Judgment.

granted for a term of years, or in perpetuity should be deemed good and valid tenures according to the terms of the covenants or engagements interchanged, notwithstanding that the same may have been executed before the passing of Regulation V of 1812, while the rule of section 2, Regulation XLIV of 1793, was in full force and effect.

We cannot doubt that this Regulation was intended to apply to leases, like the present, which might have been avoided by the grantor or his heirs during the time that the Regulation of 1793 was in force, but which (so far from having been avoided) had been acted upon by both parties, after the expiration of the ten years, and *were treated and considered as in existence at the time of the passing of the Regulation of* 1819.

The sole question, therefore, in this case is, whether the pottah was intended to be in perpetuity, or only for the life of the grantee.

It was granted by the Rajah to Roghoo Nath Singh under the description of "*the mocurrari ijaradar*" of Mouzah Bhalwana.

It states that the mocurrari ijara pottah of the mouzah is thereby granted to Roghoo Nath Singh from 1206 Fusli, at a consolidated jumma of Rs. 6 for the years 1206, 1207, 1208, and 1209, and at a uniform rent of Sicca Rupees 25 from the year 1210, to be paid year after year. It provides that this rent shall be inclusive of malikana, and that the mocurraridar should with ease of mind make cultivation and improvements, and pay the rent year after year to the Rajah, raising no objection on the score of drought, inundation, &c., but should himself bear the loss arising therefrom. It further provides, that any profit to be derived from salutary improvement should belong to the mocurraridar, and not to the Rajah; that the mocurraridar should treat the tenants well, and should not give a single span of land in the village without asking permission of the Rajah, nor resume any land previously granted without the Rajah's orders, and that should the lakhiraj lands be resumed under the Rajah's orders, and should the Rajah be pleased to make a settlement of the land with the ticca mocurraridars, the latter should pay the rent according to the settlement to be made with the Rajah.

provides, "that the mocurraridar should not suffer a
of the land in the limits and boundaries to pass
the estate, or to be included in the boundary of other
nd that should any thing of the kind happen, the
ıld be informed of it, and the matter should be settled
d of the Rajah, and the boundaries of the Mouzah
and confirmed; and further, that the mocurraridar
allow robbers and bad characters to settle within the
hat he should act in strict conformity with the orders
to be passed by the Rajah for the payments of rents
and malgozars of all classes."

ıtiff contends that this instrument in itself does not
hereditary estate, and that there is nothing in the
, or in the circumstances under which it was granted,
the supposition that it was intended to be of an
character, or extending beyond the life of the
ar.

ndant, on the other hand, contends, that the mere fact
; *mocurrari pottah* is sufficient to raise a *primâ facie*
n in favor of its being hereditary, and that the terms
rument, the circumstances under which it was granted,
)sequent conduct of the parties all tend to strengthen
mption is one peculiarity about this case which dis-
it from most others of a similar character, which have
the consideration of the Courts, namely, that notwith-
ıe pottah was granted some 80 years ago, the original
) lived until the year 1875, and the question as to the
ıe instrument has arisen immediately upon his death;
ıave here no usage or course of succession to guide us,
ırved in some cases as a means of interpreting the inten-
parties, and has been held to supply the omission of
heritance (see *Baboo Dhunput Singh* vs. *Gooman Singh*,
I. A., 433, and the case of *Joba Singh*, 4 S. D. A. Re-
ited by the Privy Council.) We must, therefore, look
terms of the instrument itself, and to the circumstan-
ch it was made, in order to see whether there is any
ing that it conferred a hereditary tenure.

ate Judge very properly observes that in the word

1879

SHEO PERSHAD SINGH v. KALLY DASS SINGH.

Judgment.

"mocurrari" itself there is nothing which necessarily imports perpetuity.

In several cases decided by the Sudder Dewany Adawlut it was held that the word "mocurrari," even when coupled with "istemrari," did not denote a hereditary estate; and although (as was said by a Division Bench of this Court in the case of *Lakhoo Koer* vs. *Hurree Kishen Roy*, 12 W. R., 3) the decisions of the Court of Sudder Dewany Adawlut may not be *absolutely binding* upon the High Court here, it seems to us, that they are entitled to great respect, especially when they relate to a technical expression in a lease, the use and meaning of which was understood at least as well 30 or 40 years ago, as it is now.

The learned Judges in that case considered that the words "mocurrari istemrari" did not confer a lease in perpetuity, and the same construction appears to have been put upon them by TREVOR and CAMPBELL, *J.J.*, in the case of *Munrunjun Singh* vs. *Rajah Lelanund Singh*, 3 W. R., 84, and again in *Rajah Lelanund Singh* vs. *Thakoor Munruniun Singh*, 5 W. R., 101.

In this last case a review was applied for upon the ground that the learned Judges had not correctly apprehended the meaning of the word "istemrari." They had considered it as meaning "*perpetual in point of time;*" and to that construction they adhered.

On appeal, however, from that decision to the Privy Council (13 B. L. R., 133) their Lordships held, that the words "mocurrari istemrari" might mean either "*permanent during the lifetime of the person to whom the grant was made, or permanent as regards hereditary descent,*" but that, in that particular case, coupling the words with the usage that had prevailed, the tenures were hereditary.

In this case the word "istemrari," which was relied upon in the above authorities as importing perpetuity, is not used; and with regard to the meaning of the word mocurrari alone, their Lordships of the Privy Council in the case of *Bengal Government* vs. *Nawab Jafur Hossein Khan* (5 Moore's I. A., p. 598) say this:- "It was intimated in one of the precedents cited, that the word mocurrari may import perpetuity, but their Lordships apprehend, that although the word may have that import, this is a

the necessary meaning of the word, and they are satisfied that, as used in the documents in this case, it has not that import."

As therefore the word "mocurrari" alone raises no presumption that the tenure was intended to be hereditary, we must see whether, having regard to the other terms of the instrument, the circumstances under which it was made, or the conduct of the parties, we have any reason to suppose that in this instance the pottah was intended to be hereditary.

The Subordinate Judge has held that it is so, principally for these reasons.

He says that as the gross produce of the village was put down in the year 1250 at Rs. 6-3-10, and as the entire area of the mouzah was found in 1846 to be 7,500 beegahs, of which 3,000 were cultivated and 4,500 covered with jungle, it must be taken that when the pottah was granted, the larger portion of the mouzah was covered with jungle, and that the lease was granted with a view to large improvements being made, and a good deal of money being laid out by the grantee; and he further finds, as a fact, that the property has been largely improved by the grantee, and that the latter would not have laid out so much money upon it, unless he held it in perpetuity.

The Subordinate Judge also lays some stress upon the subsequent conduct of the parties.

The Judge says:—"The appellant took the said mouzah in mocurrari from the respondent's father at a small rent, when he had to clear it of jungle and bring it into cultivation, and has now reclaimed and brought it into cultivation at a considerable outlay, and has not yet reaped benefit commensurate with the expenses incurred by him, and the decree was, that the appellant should remain in possession of Mouzah Bhalwana in accordance with the mocurrari pottah.

The Subordinate Judge in the present case appears to attribute some weight to the above judgment as showing that at that time Roghoo Nath had brought the mouzah into cultivation at heavy expense, and that Roghoo Nath himself considered and described his interest as a permanent one.

We think it clear, however, that we can only use this judgment for what it really decides, namely, that Roghoo Nath was decreed

1879

SHEO PERSHAD SINGH v. KALLY DASS SINGH.

Judgment.

to pay the Rs. 25 rent, and not the Rs. 51, or in other words that he held under the pottah in question, and not under the pottah set up by the Rajah. The Judge did not mean to decide, nor could he have decided in that suit, that the pottah conveyed an hereditary tenure, and we think the word *permanent* is used in the judgment to describe the *morcurrari pottah* as distinguished from the *ticca pottah for* 11 *years only*.

The Subordinate Judge is of course quite right in saying, that the lease was granted with a view to the improvement of the mouzah. The pottah in fact says so in plain terms. It was not at all likely that the Rajah would have granted so large a property even for the life of the grantee, at little more than a nominal rent, unless with a view to some advantage for himself; and the only advantage which he apparently obtained or could obtain in this instance consisted in the improvements to be made by the grantee.

The area of the estate seems to be no less than 7,500 beegahs. The value of it at the present time is estimated at Rs. 1,00,000. Roghoo Nath was a minor at the time when the pottah was made, and therefore in the ordinary course of things a lease for life of such a property at such a rent would be a most advantageous bargain for the grantee. He was not bound down to any particular measure of improvement. If his life was a short one, the improvements which he effected would probably be but few.

The longer his life, the more improvements he would carry out, and the greater in such case would be his own gain. He might use his own discretion in that respect; but under no circumstances, having regard to the smallness of the rent, and the fact that he paid no premium, would he, if he were an ordinarily prudent man, be a loser.

But, on the other hand, if the tenure was to be in perpetuity, what advantage could the Rajah or his successors expect to gain from it? He would then have parted for ever with his valuable property at a nominal rent of Rs. 25. The Subordinate Judge says, that the consideration of this grant was the improvements to be made by the grantee. But how could this improvement be any benefit or consideration to the grantor or his heirs, if the grant were to be in perpetuity? In this case the grantee would see

the whole benefit of them; and the grantor would get nothing, let the property be increased in value ever so much, except his Rs. 25 a year.

In most other cases of this kind, where leases have been held to be hereditary, either the rent reserved has been a substantial one, or a considerable premium has been paid to the grantor. But here the grantor, if the pottah were construed as hereditary, would be parting with his property for no consideration whatever. It is strange that this view of the matter seems wholly to have escaped the notice of the Subordinate Judge.

If any other argument were wanting to induce us to find in favor of the plaintiff, it would be supplied by some of the other provisions of the lease, which seem necessarily to imply that a substantial interest in the property remained in the Rajah, and which are quite inconsistent with his having permanently parted with that interest.

If the grant was in perpetuity, why was the permission of the Rajah necessary, before a single spun of land in the mouzah could be parted with any body? Why was the Rajah to be consulted in the adjustment of boundary disputes with the neighbouring proprietors? Why should there be any provision for securing the tenants of the mouzah in their holdings, and giving the tenants proper receipts upon payment of their rents? All these would be very important stipulations for the Rajah, if the grant were to be for the life of the grantee, but would be wholly, or almost wholly immaterial, if the Rajah's interest in the estate were only the possibility of an escheat at some future time.

For these reasons we are clearly of opinion, that the judgment of the Court below is wrong, and that the plaintiff is entitled to recover possession of the property in suit, with mesne profits against the defendants of the 1st part as regards the 12 annas share, and against the defendant of the 2nd part as to 4 annas.

The plaintiff will also recover his costs in both Courts from the defendant of the 1st and 2nd parts, in proportion to the shares which they respectively claim, but he must pay the costs in the first Court of the defendant, 3rd party, inasmuch as they never disputed his title, but on the contrary admitted it before the Magistrate, and allowed him to take possession.

[CIVIL APPELLATE JURISDICTION.]

1879. *August 25th.*

No. 1866 of 1878.

H. H. CANNON (DEFENDANT) . . . . . APPELL

AND

BISSONATH ADHICARI (PLAINTIFF) . . . RESPOND

Chur land—Island—Parties—Suit to recover Chur lands claime Government as an Island, and Settled with Defendants.

Plaintiff brought a suit for recovery of possession of land which been thrown up by a large navigable river, and which he alleged fo an accretion to his estate. The defendant who was in posse claimed to hold the lands under a settlement which the Govern had made with his predecessors in title, the Government h three years previously taken up the lands as forming an island.

Held, that the Government, as claiming a proprietary right i disputed land, was a necessary party to the suit.

The date on which land thrown up by a navigable river must be t to be an island, and as such resumable by the Government, is not the of the settlement, but the date of the original formation of the lan

Budroonissa Chowdhrain vs. *Prosunno Coomar Bose*, 14 W.R., 25, cited and followed.

APPEAL from a decision of the Officiating First Subordi Judge of Rajshahye, affirming the decree of the Moonsi Pubna.

The plaintiff brought this suit to recover possession o beegahs 6 cottas of chur land from the defendant, alleging that land was a gradual accretion to his estate, and that he had l dispossessed of the same by the defendant in 1280 B.S. The fendant alleged that the Government had in 1870 settled disputed land as being an island with the maliks of Islam through whom he claimed. The plaintiff, on the other hand, tended, and all his witnesses gave evidence to that effect, that land had formed gradually in the bed of the river, and that chur had commenced to form about twelve years before. It however, admitted that a small channel intervened between plaintiff's original land and the chur. The Amin, who was dep to hold a local enquiry as to the position of the disputed l

found this channel dry. The Government was not made a party to the suit. Both the lower Courts found in favour of the plaintiff, and gave a decree accordingly.

The defendant appealed.

Baboo *Mohini Mohun Roy*, for the Appellant.

Baboo *Kisshory Mohun Roy*, for the Respondent.

The judgment of the High Court (1) was as follows:—

The plaintiff in this suit claims 48 beegahs and 6 cottahs of land as an accretion to his estate, and alleges that he was dispossessed of them by the defendant in Kartic 1280. The lower Appellate Court, however, finds that the dispossession occurred three years previously when the Government made a settlement of these lands with the predecessor in title of the present defendant. It appears that on the occasion of the Dearah Survey in 1867-68, the Government took possession of these lands as an island, and treating it as their own property settled it with certain predecessors of the defendant. The Government have not been made a party to this suit. But the lower Appellate Court has found that the Government had no authority to treat this property as an island, inasmuch as it was an accretion to the plaintiff's estate. The lower Appellate Court is not precise in its finding as to whether this property, as taken by the Government, was an island at the time of its original formation, or whether it was not an island at all. It is somewhat difficult to follow the judgment of the lower Court on this point. It says:—"The plaintiff's witnesses have deposed that the channel was fordable formerly, and even the defendants' witnesses could not assert that the channel was deep enough and unfordable. If the channel was deep enough, it could not have dried up in the course of four or five years from the date of the Government settlement." There seem to us to be two errors: *first* that the channel, if one time deep, could not have dried up in the course of four or five years from that date; and, *second*, that the date of the settlement should be taken as the date on which the land settled

(1) MORRIS and PRINSEP, *J.J.*

1879

CANNON v. BISSONATH ADHICARI.

Judgment.

must be found to be an island. Manifestly, owing to sudden changes in the river Ganges, a deep channel one year may be dried up the next. The date, too, on which a property must be taken to be an island is not the date of settlement, but as declared by a Full Bench of this Court in the case of *Budroonissa Chowdhrain* vs. *Prosunno Coomar Bose*, 14 W. R., F. B., 25, the date of its original formation.

The lower Court mentions in its judgment that "it would have been well if the defendants could show the settlement proceeding of the Government, and it was for them to show the origin of their right, which they have not done. How the Government, therefore, made the settlement does not appear." The present defendant was no party to the settlement, and knew nothing of the proceedings under which the Government took the property as an island and settled it with Shama Sunduri Dasi and others. He simply purchased the interests of one Mr. Savi, who again purchased the interests of the defaulting settlement-holders at a sale for arrears of Government revenue. It seems to us, therefore, that this is especially a case in which the Government ought to have been made a party. Here it is the Government, and not the present defendant, who has directly invaded and hostilely opposed the proprietary right of the plaintiff. Consequently, as prescribed by section 7, Act IX of 1847, the plaintiff, feeling aggrieved by the act of the revenue authorities in taking possession of the land, should sue them in assertion of his proprietary right. The cases relating to alluvial formations, in which this Court has held that the Government need not be made a party, are cases in which the contending parties were proprietors of adjoining lands, each claiming the accretions thrown up and defined by the Dearah Survey as accretions to his particular estate. Here, on the contrary, the Government appears as the proprietor of the island, setting up a title of its own adverse to the proprietor of the adjoining estate. We, therefore, remand the suit in order that the Government may be made a party to it, and in order that the state of the lands at the time of their original formation may be determined, that is, whether as claimed by the plaintiff, they are accretions to his estate, or whether they were in their inception, the

is to say, at the time of their formation an island which the Government could take under the provisions of Act IX of 1847. This view seems to us to be supported by the authority of the Full Bench decision in the case of *Mahomed Israil v. Wise*, 21 W. R., 327. 1879

Costs will abide the result.

[CIVIL APPELLATE JURISDICTION.]

LEE PHEE CHUAN AND OTHERS (DEFENDANTS). APPELLANTS; *August 14th.*

AND

No. 606 of 1877.

KASSIM HOSSEIN SOORTY (PLAINTIFF). RESPONDENT.

Carriers by Sea—Bill of Lading, Construction of—Loss by fire—Liabilities of Ship-owners for Goods after being landed.

Goods were shipped in the defendants' steamer, under a bill of lading which contained a clause protecting the ship-owners from loss occasioned by a fire, and a further clause to the effect that the goods "are to be landed from the steamer's tackle by the consignees as fast as the steamer can discharge, failing which, the steamer's agents are to be at liberty to land them into godowns,—the cost of lighterage, godown rent, etc., thereby incurred to be borne by the respective consignees."

The steamer duly arrived at its destination on the afternoon of the 11th December and at once proceeded to discharge its cargo. It does not appear that notice of the arrival was given to the plaintiff, who was the consignee of the goods. On the 12th the plaintiff applied for delivery, but was informed that the goods had been landed into the godowns and delivery could not be given, as they were covered up by other cargo. On the evening of the 12th the godowns were burned down and the goods destroyed. In a suit by the plaintiff for damages for short delivery, *held*, that the defendants were entitled under the bill of lading, for the speedy discharge of the steamer, to land the goods, and that, a reasonable time for delivery not having elapsed before the fire, they were also protected from the loss occasioned thereby, the goods being still in their custody as carriers.

Per PONTIFEX, *J.*—The ship-owners, though entitled to land the goods, were not entitled to charge for landing and wharfing unless the plaintiff had had an opportunity of landing the goods himself.

Per GARTH, *C.J.*—If the defendants were at liberty to discharge the goods into the godowns, they were also entitled to charge wharfage

1879

LEE PHEE CHUAN v. CASSIM HOSSEIN SOORTY.

Statement.

APPEAL from a decision passed by Mr. Justice WILSON.

In this case the plaintiff sued the defendants, who are ship-owners, for Rs. 11,369-4, the value of 430 bundles of tobacco shipped to Rangoon and alleged to have been short delivered by them.

The goods were shipped in December 1876 at Calcutta by the Steamer *Fitzpatrick* under a bill of lading containing the following clause:—"The goods to be taken from the steamer's tackles by the consignees as fast as the steamer can discharge failing which, the steamer's agents are at liberty to land the same into godowns, the cost of lighterage, godown rent etc., thereby incurred to be borne by the respective consignees." There was also a clause protecting the defendants from loss occasioned by fire.

The *Fitzpatrick* arrived at Rangoon on the afternoon of the 11th December, and at once went alongside the wharf, instead of discharging her cargo into boats as she lay in the stream, as was admittedly her wont, and commenced to discharge the same day placing her cargo in the godown attached to the wharf.

Esoop Ismail, a witness for the plaintiff, gave evidence that on the 12th he had gone, on behalf of the plaintiff, to the agent's office and also to the wharf to get delivery of the goods; that he had gone to the wharf first and been told by the clerk that the goods had been landed the night previous, and that delivery could not be given as the tobacco was covered up in the godown by other cargo. This evidence was confirmed by other witnesses. Some evidence was also given to the effect that on tender of the freight being made a demand was made for wharfage, &c., but that the plaintiff refused to comply with this demand.

Notice, it seems, was not given to the plaintiff of the arrival of the ship, and it is alleged that a Custom House pass could not have been obtained before 12 o'clock on the 12th.

On the evening of that day a fire broke out in the godowns, and all the goods that were in them were burned.

The defendants alleged that the plaintiff's tobacco had been landed and was consumed by the fire.

The plaintiff sued as for damages for goods short delivered, and the following issues were framed in the suit:—(1) [illegible]

1879

LEE PHEE CHUAN v. CASSIM HOSSEIN SOOBTY.

Argument.

ne of the goods; (2) was the plaintiff ready and willl he was bound to do for the purpose of taking paying freight; (3) were the defendants entitled cumstances to discharge the goods into the godown; lefendants before discharging the goods into the w the plaintiff reasonable time to take delivery; and defendants by discharging the goods into the harged themselves so as not to be liable to the plainbsequent destruction of such goods therein.

e WILSON was of opinion that the burden lay upon ts to prove that the goods were landed before the norning when the plaintiff tendered the freight and oods. The only evidence of such landing being the the excuses given by the defendant's own servants ring the goods, the learned Judge found that the entitled to recover damages at the rate claimed in on the amount of tobacco not delivered.

is decision the defendants appealed.

d *Trevelyan*, for the Appellants.

ıd *Hill*, for the Respondents.

–The plaintiff was bound by the terms of their ike delivery as fast as the ship could unload—*Straker* R., 3 Q. B. D., 223; *Leer* vs. *Yates*, 3 Taunt., 387; *unter*, 1 M. and W., 63;—and upon his not having rere entitled to land the goods upon the wharf. o landed would be covered by the clause exempting inst fire—*Hong-Kong and Shanghai Banking Corlaker*, 7 Bom. H. C. R., 186.

refused to deliver the goods to the plaintiff, though claimed. Mere non-delivery, however, will not entiff to sue as upon a conversion, nor will excuses -delivery—*Severin* vs. *Keppel*, 4 Esp., 156; *Addison* C. and P., 284. In a similar case—*Bullock* vs. *Toay* R., 74;—where the goods were taken off in lighters, the carriers were held not to he liable for the loss.

J.—That case is very different. The carriers there empted from loss under the bill of lading.]

1879

LEE PHEE CHUAN v. CASSIM HOSSEIN SOORTY.

Argument.

There is evidence to show that the goods were landed befo any demand was made for them. As we were entitled to ha landed them, we had a right to wharfage. That seems to dispo of the case.

The case set up in the plaint is different from that made the hearing, and the Judge in the Court below was wrong i allowing the question of tender and wharfage to be gone into.

Hill, for the Respondents:—

It is too late now to object that the case now made w not raised on the pleadings. The whole case depends up the question whether the defendants were entitled to land t goods, and did land them, and upon this question all t incidents of the landing were raised. The case now made w certainly raised by the issues which were settled by the lo Court.

There is no doubt that we offered to pay the freight as so as we were able to obtain a pass for the goods. The defenda demanded wharfage to which they were not entitled, and, the fore, the landing of the goods was a wrongful landing.

[GARTH, *C.J.*—That is an entirely different case from t you made in the Court below. Your original case was not t you were ready and willing to take the goods from the ship's s and that the landing was improper.]

The fact of the dispute as to the landing charges points to objection to the landing of the goods by the defendants.

The evidence points to our having gone down to the wharf enquire about the goods, and being there informed that they h been landed. The delivery order was not given (and without we could not have landed the goods) because of our refusal pay wharfage. The issue, therefore, whether we had done ever thing entitling us to delivery, was rightly raised.

In spite of the clause as to "discharging as fast as she can," t ship was bound to wait a reasonable time for us to obtain a C tom House pass and delivery order—*Alexiadi* vs. *Robinson* Fost. and Fin., 679.

We waive the right to land the goods from the ship itself, o on condition of our being allowed deliv[illegible] without [illegible] for wharfage and landi[illegible]

goods were actually landed, nor *à fortiori* of the actual burning of the tobacco in question.

In discharging the goods into the godown they were bound to pack them in such a way that we could have got at them at once, and if the goods were injured by reason of improper wharfage, the master would be liable as if no delivery had taken place.—1 Kay on Shipping, p. 351.

The statement made by the clerk, that our goods could not be delivered, because they were covered up by others, is not admissible in evidence. It is not a statement in the ordinary course of business or against interest—*Stapylton* vs. *Clough*, 2 Ell. and Bl., 933; *Price* vs. *Torrington*, 1 Smith's L. C., 344; *Sussex Peerage Case*, 11 Cl. and Fin., 85; *Doe d Patteshall* vs. *Turford*, 3 B. and Ad., 890, see p. 897. Even a statement made in the course of duty is not necessarily evidence—*Edie* vs. *Kingsford*, 14 C. B., 759.

The defendants were bound to deliver the goods on our asking for delivery, and tendering the money, and the excuse made could not avail them anything.

Branson (on same side):—

The effect of the clause in the bill of lading as to taking delivery as fast as the steamer can discharge, is that as soon as discharging has begun, and an opportunity has been given to the consignee, the ship had a right to go on discharging, irrespective of whose goods might be uppermost. We never acquiesced in the landing in this case—*De Bussche* vs. *Alt*, L. R. 8 Ch. D., 7, see p. 314.

We cannot be said to have acquiesced in the landing merely because we did not insist on having the goods put back into the ship and delivered to us from the ship's side.

Taking the two cases of *Galliff* vs. *Bourne*, 3 M. & Gr., 643 (n) Report in 3 Scott's New Reports) and *Alexiadi* vs. *Robinson* (other, there is authority for saying the defendants were not justified inlanding the goods as they did.

Grantlyan in reply, quoted *Heald* vs. *Carey*, 11 C. B., 977, on the subject of conversion.

1879

LEE PHEE CHUAN v. CASSIM HOSSEIN SOORTY.

Judgment.

PONTIFEX, *J.*

The following judgments were delivered by the Court (1):—

PONTIFEX, *J.*:—

The learned Judge in the Court below has held upon the bill of lading in this case that the ship-owners had the right to land the goods, and charge for landing and wharfing: but he has given a decree to the plaintiff on the ground that there was no proof that the goods had been landed at the time when landing and wharfage charges were claimed.

It appears to me that there is no question in this case that the goods were landed and wharfed by the ship-owners, and burnt.

I am unable to go as far as the learned Judge appears to have gone, and to hold that the ship-owners were entitled to claim landing and wharfage charges, whether an opportunity had, or had not, been given to the plaintiff to land the goods himself. But I am of opinion that for the speedy discharge of their vessel, the ship-owners were entitled to land and wharf the goods, though not to charge for landing and wharfing, unless the plaintiff had had an opportunity for landing the goods himself.

Under the words of the bill of lading, I think the ship-owners were entitled to charge for landing and wharfing only in default of plaintiff failing to do so in a reasonable time; and I do not think the plaintiff had been allowed a reasonable time for landing the goods himself, if they were in fact landed before 4 o'clock on the day after the ship's arrival.

In the late case of *Wright* vs. *New Zealand Shipping Company Limited*, Law Reports, 4 Exch. Divn., 165, where it was necessary to define what was a reasonable time under ordinary circumstances for unloading, Lord Justice COTTON stated that the question as to what might be a reasonable time depended on the facts of each case; but speaking chiefly with reference to the case before him, said, that the charterer should be re-

(1) GARTH, *C.J.*, and PONTIFEX, *J.*

1879

LEE PHEE CHUAN v. CASSIM HOSSEIN SOOBTY.

Judgment.

PONTIFEX, J.

to unload "either when the ship arrives, or within a short time, such as a day or a couple of days after her arrival." In that case the shipper chartered the entire vessel which was a sailing ship. In the present case the ship was a general ship, and a steam ship; and the words of the bill of lading import, I think, more urgency, and at least authorize the ship-owners to land, without charging for it, and to place the goods in a godown.

In *Alexiadi* vs. *Robinson*, 2 F. and F., 679, it was held that the consignee was entitled to time to receive the necessary documents and make the necessary entries at the Custom House.

It appears to me that our decision in this case ought to rest on the simple question:—Were the goods lost to the plaintiff by reason of an improper refusal by the defendants to give a delivery order? If yes, then the plaintiff would be entitled to recover. If no, then he had no cause of action.

With respect to the evidence, I am unable to arrive at the conclusion that the plaintiff made a definite tender of the freight which was refused.

As I read the evidence, I take it that what happened was as follows:—

The plaintiff, taking with him a person who, if satisfied with the quality, proposed to purchase his tobacco, went to the defendant's office with the freight money. But having been previously told, at the wharf, by a servant of the defendants' (from the plaintiff's witness, Sooleyman Ahmedjee, describes as "the godown-keeper, a Chinaman," that his goods had not been landed during the night, and were so covered by other goods that they could not immediately be got at, he repeated this statement to the agent of the defendants at his office. Thereupon a loose conversation ensued, and the Agent said that if the goods had been landed, landing and wharfage charges would have to be paid. Indeed, at this time as there was no certainty how many, if any, packages had been actually landed, it must have been impossible for the defendants to have asked for a definite sum for landing, and I should have thought that the natural place and time for demanding payment of these charges would have been the time of delivery at the godown. But, however this may be, the plaintiff made objection, but does not seem to have abso-

1879

LEE PHEE CHUAN v. CASSIM HOSSEIN SOOBTY.

Judgment.

PONTIFEX, J.

lutely refused to pay the charges; nor did he insist upon a delivery order being given to him on payment of freight alone; nor in his plaint does he make any such case. If the plaintiff's objection had been admitted and consented to, could the plaintiff have obtained his goods before the fire? I think the evidence goes to show that he could not, as they were covered by other goods in the godown. And beyond that, if the defendants were entitled for the speedy discharge of their ship to land the goods, as in my opinion they were entitled, the goods continued in their possession as carriers in a place sanctioned by the bill of lading, and it seems to me that the defendants as carriers were entitled to a reasonable time for giving delivery, in the same way precisely as the plaintiff was entitled to a reasonable time for taking delivery, and I think that such reasonable time had not expired when the fire happened, and therefore that the accident was covered by the exception in the bill of lading.

In the case cited from 2 F. and F., the facts were that, before the goods were actually landed, the consignee, having his lighter alongside, applied for the goods and tendered the freight; but the master refused to receive the freight without the order of the ship's agents, who had no representative on board; and the landing of the goods commenced and proceeded against the expressed wish to the contrary of the consignee.

The question as put to the jury by COCKBURN, *C.J.*, was in fact whether the ship-owner took the course he was entitled to take under the circumstances, in having the goods landed when the consignee was ready to receive them. And in that case, even after having been landed, the goods were actually at hand, but upon demand delivery was refused, because payment of wharfage charges was objected to by the consignee.

In the present case, the evidence seems to me to show that the goods were never at hand, in the sense that the plaintiff actually applied for them and could have received them, but for the objection to pay landing and wharfage charges.

Upon the whole, therefore, I am unable to agree with the conclusion of the Court below; and I think the plaintiff's suit should have been dismissed, but under the circumstances, the goods having been landed for the defendant's convenience, without

1879

LEE PHEE CHUAN v. CASSIM HOSSEIN SOORTY.

Judgment.

GARTH, *C.J.*

I think, however, that the plaintiff should pay the costs of this appeal. The plaintiff may possibly be entitled to receive from the defendants some portion of the money realized by the sale of the damaged goods after the fire; but we cannot deal with that matter in this suit.

GARTH, *C.J.*:—

This suit is brought by the plaintiff to recover damages for the non-delivery of certain goods which were shipped from Calcutta to Rangoon by the Steamer *Fitzpatrick* in December 1876.

The defence is, that the goods were landed in due course and placed in a godown at Rangoon, and were there burnt by an accidental fire.

The *Fitzpatrick* was a general ship, and the bill of lading under which the goods were shipped contains a clause protecting the defendants against any loss by fire; and it also contains another clause, which is important for our present purpose, to the effect that "the goods were to be landed from the steamer's tackles at Rangoon by the consignees as fast as the steamer could discharge, failing which, the steamer's agents were to be at liberty to land them into godowns,—the cost of lighterage, godown rent, &c., thereby incurred to be borne by the respective consignees."

The ship arrived at Rangoon on the 11th December 1876, and was taken at once alongside the wharf. On the same evening she began to unload the goods of the several consignees into a godown upon the wharf, and continued to do so during the whole of that night and the following day, the 12th. The fire occurred at 7 o'clock on the evening of the 12th, and I think sufficiently appears that the goods in question were burnt.

The plaintiff's agent Esoop Ismail, who was the consignee of the goods in question, received his bill of lading soon after the arrival of the ship on the 11th. He did not take any steps to obtain the goods on that day; and it seems doubtful whether he could have obtained his pass from the Custom House if he had applied for it. At any rate, he did not obtain it until the following morning (the 12th), and he then went to the wharf and asked the clerk, who had charge of the godown, whether the goods had been landed. The answer was that they had been landed during the night, but that he could not have delivery of

1879

LEE PHEE CHUAN v. CASSIM HOSSEIN SOORTY.

Judgment.

GARTH, *C.J.*

them till the next day, as other people's goods had been placed on the top of them. Esoop Ismail then went to the office of the defendant's agent, a Chinaman, named Sing Moh, and asked for a delivery order. The evidence is conflicting as to what passed on the occasion, but I believe Esoop Ismail's story to the effect that Sing Moh claimed wharfage dues, and Esoop Ismail refused to pay them. In the afternoon of the same day, Esoop Ismail went again to look for his goods at the wharf, but could not find them.

Eventually, after the fire, he paid freight for the whole of the goods, and obtained a small portion of them. But on that occasion no wharfage was demanded or paid. As the goods were not forthcoming, of course no wharfage could have been payable; and therefore the fact of no wharfage having been claimed after the fire is no argument in favour of the plaintiff.

In this state of facts, the learned Judge in the Court below decided in favour of the plaintiff. He held, that under the terms of the bill of lading, the defendants had a right to commence unloading the ship immediately on its arrival, and if the plaintiff's agent was not there to receive the goods, they had a right to place them in the godowns at once, and charge wharfage rent, &c. But then the learned Judge considered that there was not sufficient evidence that at the time when the plaintiff's agent was required to pay wharfage dues, and refused to pay them, the goods had been in fact landed in the godown, and, consequently, he decided that the charge for wharfage was improperly made, and that, as the refusal to pay it was the reason why the defendant's agent would not give the delivery order, the defendants must be held liable for the loss of the goods.

Now the difficulty which the learned Judge's view of the case presents to my mind is this:

If the goods were in the godown at the time when wharfage dues were claimed, the plaintiff's agent might no doubt have obtained delivery of them; but in that case the defendant's agent was justified in claiming wharfage, and Esoop Ismail was wrong in refusing to pay it.

If, on the other hand, the goods were not in the godown at the time when wharfage dues were claimed, then the plaintiff

1879

LEE PHEE CHUAN v. CASSIM HOSSEIN SOORTY.

Judgment.

GARTH, *C.J.*

agent could not then have obtained them, even if he had received his delivery order, and I am by no means satisfied, that in that case the plaintiff's agent could or would at any subsequent time have obtained delivery of them, before the fire occurred.

The construction which I put upon the bill of lading is somewhat different from that which has been put upon it by the Court below.

I consider that it was not intended to relieve the defendants from their ordinary obligation as carriers to give the consignees a reasonable time to come and receive the goods from the ship, before they placed them in the godowns. (See *Bourne* vs. *Gatliffe*, 3 Manning and Granger, p. 643.) On the contrary, the clause appears to me expressly worded so as to secure to the consignees the option of landing the goods, if they pleased, from the ship's tackles, and it was only in default of their being ready to receive them from the ship's tackles that the defendants had any right to place them in the godown, and charge the consignees wharfage dues.

Moreover, the consignees were entitled, in my opinion, to a reasonable time to land the goods, if they so pleased, from the ship, and if I were satisfied that Esoop Ismail was ready and willing to have landed the goods at the ship's tackles, if he had been allowed a reasonable time for that purpose, and that the defendants would not permit him to do so, I should certainly have acceded to the argument that has been pressed upon us by the plaintiff's Counsel, that the defendant had no right to place the goods in the godown at all, and must be answerable for the consequences of having done so.

But it seems to me, that from first to last this was not the plaintiff's case, or the plaintiff's complaint. He never testified in any way, as far as I can see, his wish or readiness to land the goods from the ship's side. Esoop Ismail never applied to the defendant's agent, or to the ship's officers, to be allowed to land the goods in that way. He asked for the goods on the morning of the 12th, not from the ship, but from the clerk who had the charge of the godowns;—and when he was told by him that the goods were in the godown, he never complained either to the clerk or the ship's agent that he had not had the opportunity given him of landing the goods from the ship.

1879

LEE PHEE CHUAN v. CASSIM HOSSEIN SOOBTY.

Judgment.

GARTH, *C.J.*

Nor again, when he wrote for compensation before bringing this suit, nor when the plaintiff stated his grievances in detail in his plaint, nor even in the conduct of the case in the Court below, do I find that any complaint was made or evidence offered that Esoop Ismail wished or attempted to land the goods from the ship and was not allowed to do so. If he had put his complaint in this form, the defendants might have been prepared to prove more conclusively than they have done, that the plaintiff and the other consignees consented to the goods being unloaded into the godown. As it is, it seems to me that the facts all tend to show the plaintiff's acquiescence in the course that was taken.

None of the consignees, so far as I can see, either received, or asked to receive, their goods from the ship's side. No questions upon this point were put to any of the witnesses on either side. The consignees generally appear to have acted upon the assumption that the course which was taken by the ship was the right one; and though Esoop Ismail objected to pay the wharfage, he never complained that the defendants had no right to land the goods into the godown, or stated any other reason for his objection. It seems to me, therefore, that it is a great deal too late now for the plaintiff to attempt to say that he never had an opportunity given him of landing his goods from the ship, and that the course taken by the defendants was improper.

That being my view of the case, the plaintiff's cause of complaint appears to me to resolve itself into the one point upon which the judgment in the Court below proceeded, namely, that, although the defendants were justified in placing the goods in the godown, they had no right to charge wharfage for them, at any rate, till the goods were actually there.

But according to the construction which I put upon the bill of lading, if the defendants were at liberty to discharge the goods into the godown, they were also entitled to charge wharfage dues.

If it were necessary to decide the point, I do not think that the statement of the godown clerk, (even assuming it to be evidence at all, which I much doubt) would justify us in finding

as a fact that the goods were in the godown, and covered up by other goods, at the time when Esoop Ismail, the agent, applied for them.

But whether they were then in the godown or not, if the plaintiff's agent consented, as I think he did, to the goods being landed in that way, then I consider that the defendant's agent was justified, before he allowed him to have the delivery order, in asking him to pay the wharfage dues. I am not satisfied, as I have already stated, that if the plaintiff had obtained the delivery order when he applied for it, he would have been able to get his goods from the godown before the fire occurred; but as he did not pay the wharfage dues, and consequently did not obtain the delivery order, I think that if the fault was anywhere, it was with himself.

In my opinion, therefore, the judgment of the Court below should be reversed, and the plaintiff's suit dismissed. I should have been disposed to have given the defendants their costs in both Courts; but in deference to the view of my learned colleague, I agree that they shall have their costs in this Court only, and not the Court below.

If the defendants have paid the costs in the lower Court, those costs must be refunded by the plaintiff.

[ORIGINAL CIVIL JURISDICTION]

1879.
Sept. 23rd.

IN THE MATTER OF JUGGESSUR ROY.

Privilege from arrest—Small Cause Court, Calcutta, Control of High Court over—Act X of 1877, *section* 642—*High Courts Criminal Procedure Code, Act X of* 1875, *section* 148 (*c*).

Where a defendant in a suit in the High Court was arrested in execution of a decree of the Calcutta Court of Small Causes, while attending before an arbitrator appointed by the High Court to take a reference in the suit, it was *held*, that he was privileged from such arrest while so attending, and that the High Court had power to direct his release from custody.

Small Cause Courts in the Presidency towns are subject to the order and control of the High Courts—In the matter of *Omirtolall Dey*, I. L. R., 1 Cal., 78, followed.

THIS was a rule to show cause why one Juggessur Roy should not be released from the custody of the Superintendent of the Presidency Jail, where he was being detained in execution of a decree obtained against him by one Boikunt Nath Mullick in the Presidency Small Cause Court.

The rule was obtained under the following circumstances :—Juggessur Roy was defendant in a suit in the High Court, which came on for hearing on the 25th of March last, when a reference to an arbitrator was directed by the Court. On the 22nd August a notice was served by the arbitrator appointed, to the effect that the reference should proceed on the 25th of the same month, and calling upon him to attend.

Upon that day the reference was taken up, and while witnesses were being examined a bailiff of the Small Cause Court entered the room in which the proceedings were being taken, and arrested Juggessur Roy in execution of a Small Cause Court decree. He was thereupon taken before the Fifth Judge of the Small Cause Court, and that Judge ordered him to be sent to the Presidency Jail.

An application was then made to the High Court for the release of the prisoner, and the rule was granted as above stated.

Bonnerjee showed cause.

Bonnaud, for the Prisoner.

1879

In re JUGGESSUR ROY

Judgment.

Bonnerjee.—The only power which the Court has in cases of arrest of parties to a suit is under section 642 of the Civil Procedure Code as amended by Act XII of 1879; but inasmuch as the arrest in this particular case was made in execution, not of the High Court, but of the Small Cause Court, that section does not apply, for it does not empower the Court to interfere with an arrest by another Court.

Section 148 (c) of the High Courts Criminal Procedure Code gives the Court power to direct that a person illegally or improperly detained in public or private custody within the limits of its Ordinary Original Criminal Jurisdiction be set at liberty. But there is now no such thing as a writ of *Habeas Corpus* upon the return to which the Court might see whether the imprisonment was proper or not.

In the case, however, of *In re Omirtolall Dey*, I. L. R., 1 Cal., 3, PHEAR, *J.*, held that a Small Cause Court in a Presidency town was a Court of inferior jurisdiction, and subject to the order and control of the High Court. If the Court should be of opinion that the ruling in that case must be followed, then I might direct the release of the prisoner.

WILSON, *J.*

WILSON, *J.* :—

I think that I am bound by the decision in the case of *Omirtolall Dey*, and that accordingly I have power to direct the release of the prisoner. I think that he was privileged from arrest while attending before the arbitrator.

[ORIGINAL CIVIL JURISDICTION.]

August 12th.

BIND CHUNDER ROY . . . . . PLAINTIFF;

AND

NATH SHAW . . . . . DEFENDANT.

Interrogatories—Cross-Interrogatories.

WILSON, *J.*:—Where interrogatories have been administered for examination of a witness by one party, and the other party puts cross-interrogatories, the latter must, if he objects to any of the other party's questions, make his objections on the face of the cross-interrogatories, and such objections shall be argued at the hearing.

[ORIGINAL CIVIL JURISDICTION.]

1879 *July 21st & August 16th.*

No. 389 of 1879.

RADHAKISSEN ROWRA DAKNA . . . . PLAINTIFF;

AND

CHOONEELALL DUTT . . . . . DEFENDANT.

Registration Act (III of 1877), sections 34, 35, 73, 74, 76, 77—Suit to compel registration—Denial of execution of document—Document, Refusal to attend and admit execution of—Parties.

A refusal to admit execution of a document presented for registration is a denial of execution, within the meaning of the Registration Act, III of 1877; a wilful refusal or neglect to attend before the Registrar and admit execution in obedience to a summons is a refusal to admit, and therefore a denial.

The Registrar is not a necessary party to a suit properly brought under section 77 of the Registration Act.

THIS was a suit brought under section 77 of the Registration Act (III of 1877) for a decree against the defendant, directing the registration of a mortgage deed executed by him in favor of the plaintiff.

The mortgage, which was to secure the payment of debt of Rs. 21,000, was executed on the 27th of September 1878, in Calcutta, in consideration of the plaintiff agreeing to give the defendant six months' time. On the same day it was agreed that the defendant should attend, whenever required, at the office of the Registrar, to admit the execution of the document, and subsequently the plaintiff requested the defendant so to attend on the 12th of October, but the defendant neglected to comply with this request.

The Registrar thereupon, at the instance of the plaintiff, issued a summons requiring him to attend on the 29th of October, and the summons was personally served upon him. He did not attend in obedience to the summons, and a warrant was then issued, but the defendant had meanwhile absconded, and the warrant was never served upon him.

After considerable delay the Registrar, on the 28th March 1879 refused to register. The execution of the mortgage was proved by the plaintiff and his attorney.

1879

RADHAKISSEN ROWRA DAKNA v. CHOONEELALL DUTT.

Argument.

The Registrar was not made a party to the suit.

The plaint prayed that the indenture of mortgage might be directed to be registered by the Registrar if presented at his office within 30 days from the date of the decree to be made in the suit.

Hill, for the Plaintiff.

No one appeared for the Defendant.

Hill.—Any person claiming under a document may apply under section 32 of Act III of 1877, to have it registered. If then any of the persons by whom it purports to be executed deny the execution, the Registrar, under section 35, shall refuse to register. But such refusal must not be arbitrary, but after due enquiry under Chapter XII of the Act.—See Proviso to section 35. For the purposes of such enquiry, he is empowered to call witnesses under section 75, to prove the execution. Yet in this case, although the execution was proved by the plaintiff and his attorney, the Registrar refused to register, on the ground that the conduct of the defendant amounted to a denial of execution under section 35.

It is submitted that the conduct of the defendant does not amount to denial within the meaning of section 35; for the denial here spoken of is a denial before the Registrar.

The refusal of the Registrar in this instance is a refusal under section 76 to register after an enquiry instituted, and the proper remedy is by a suit under section 77.

[WILSON, *J.*—You are asking for relief under section 77, but that section assumes that the Registrar is in error. Ought he not to have been a party to this suit?]

I submit not. Under the former Act it was not the practice in similar cases to make the Registrar a party.

[WILSON, *J.*—At any rate the defect of parties (if there be any) cannot defeat your suit. I shall consider the matter, and if the Registrar is a necessary party I shall allow you to join him as a defendant.]

C. A. V.

On the 16th of August, the following judgment was delivered

1879

RADHAKISSEN ROWRA DAKNA v. CHOONEELALL DUTT.

Judgment.

WILSON, *J.*

WILSON, *J.*:—

This case raises a point upon the construction of the Registration Act, 1877.

The suit is brought under section 77 of the Act; and the plaintiff asks for a decree against the defendant ordering the registration of a deed of mortgage executed by the defendant in favour of the plaintiff. The due execution of the deed by the defendant on the 27th of September 1878 was clearly proved. It was presented for registration to the Registrar for Calcutta on the 12th of October following. The defendant not appearing to admit execution a summons was issued against him on the same day. The summons was served personally, and that he perfectly understood its object is clear; because it is in evidence that, when served, he said "why have you taken out this summons, I will go personally and register."

He however disobeyed the summons, and did not at any time attend to admit execution; but kept out of the way to avoid any further process. I am satisfied that the defendant disobeyed the summons and took the course he did take expressly to avoid admitting execution, and so prevent the registration of the deed. The Registrar heard the statements of the witnesses to the execution. A long delay intervened, and ultimately, on the 28th of March 1879, the Registrar refused to register. The question is, whether, under these circumstances, the present suit will lie. This depends on several sections of the Registration Act, 1877.

Sections 34 and 35 give the rules ordinarily to be observed on the presentation of a document for registration, and the cases in which it is and is not to be registered.

Among the cases excepted in section 34 are those under sections 75 and 77. To understand these latter sections it is necessary first to read those that immediately precede; namely, sections 73 and 74, as well as section 76.

These various sections deal in terms only with two cases—that in which execution is admitted, and that in which it is denied; they say nothing of any intermediate case. I think, therefore, it is reasonable to say that a refusal to admit is a denial within the meaning of the Act.

1879

RADHAKISSEN ROWRA DAKNA v. CHOONEELALL DUTT.

Judgment.

WILSON, J.

Again section 34 excepts cases under sections 75 and 77 from its provisions which in other cases rigidly require the attendance before the Registrar of the person by whom the documents purport to have been executed.

It therefore implies, I think, that there may be a denial other than an actual denial in the presence of the Registrar. Section 73, dealing with proceedings before a Sub-Registrar, merely speaks of his refusing to register a document on the ground that the person in question "denies its execution." Section 74 says that "in such case, and also where such denial is made before a Registrar in respect of a document presented for registration to him," he may inquire into the fact of execution. This section speaks of a denial before the Registrar. But this means, in my judgment, only a denial in a proceeding before the Registrar.

I have already stated that I think a refusal to admit execution is a denial within the meaning of the Act. I further think that a wilful refusal or neglect to attend and admit execution in obedience to a summons for that purpose is a refusal to admit, and therefore, a denial.

It follows that in this case there was a denial within the meaning of section 74; and that the refusal to register was a refusal under section 76, and therefore, this suit is properly brought under section 77.

I do not think the Registrar is a necessary party to the suit. Had there been anything in the circumstances of the case that led me to think he ought to be made a party, I should have adjourned the hearing to allow of this being done.

The decree will be for the plaintiff in terms of the first prayer in the plaint, with costs.

[CIVIL APPELLATE JURISDICTION.]

1879 *August* 15*th*.

No. 17 of 1879.

RAMANAGRA SINGH AND ANOTHER . . . } (JUDGMENT-DEBTORS,) APPELLANTS;

AND

RAMYAD SINGH AND OTHERS.. . . . . } (DECREE-HOLDERS,) RESPONDENTS.

Joint family property—Suit to recover immoveable property sold in execution for debt of one member of joint family—Lien, Declaration of, in favour of defendant not enforceable as a decree—Equity.

In a suit by certain members of a joint Hindu family to recover from the auction-purchaser certain immoveable property which had been sold in execution of a decree against one member of the family, a decree was obtained for possession subject to a lien in favour of the defendant for the repayment of the debt for which the original decree had been made, with interest at 6 per cent. up to date of realization.

Held, that the condition in favour of the defendant was not a decree, and could not be treated as such so as to be capable of being put in execution.

Sadaburt Pershad Sing vs. *Foolbas Kooer*, 3 B. L. R., (F.B.) 31, cited.

APPEAL from an order passed by the District Judge of Tirhoot.

Baboo *Bhowany Churn Dutt*, for Appellants.

Baboo *Kali Kishen Sein*, for Respondents.

The facts sufficiently appear from the judgment of the Court (1), which was as follows:—

It appears to us that both the parties and the Court below have been proceeding under an entire mistake as to the effect of the decree of this Court, dated the 12th June 1874, in Regular Appeal No. 209 of 1872. That was a suit on behalf of certain members of a joint Hindu family to recover from the purchaser at an execution sale, property which had been sold for the debt

(1) AINSLIE and BROUGHTON, *J.J.*

one of the members of the family, on the ground that no single member has any defined share which was capable of being encumbered or alienated by him. The Court held in accordance with the decision of the Full Bench in the case of *Sadaburt Pershad Sing* vs. *Foolbas Kooer*, 3 B. L. R., 31, that as a matter of law the debtor was not competent to create a charge on the property, and that, therefore, the plaintiff was entitled to succeed; but looking to the circumstances of the case the Court thought it inequitable that the plaintiff should succeed on his own behalf and on behalf of his father, the original debtor, and that the latter should get the property back discharged of all encumbrances, and the creditors should be deprived entirely of the money advanced by them. It therefore imposed on the successful plaintiff certain terms, and made the decree for possession subject to a lien in favour of Ramyad and others, for the repayment of the three thousand rupees advanced by them to the father, and fixed six per cent. as the interest which should be charged in respect of their claim up to the date of realization.

There clearly could not be a money decree in favor of the defendants, the suit being a suit by the plaintiff for the recovery of immoveable property to which the provisions for set-off did not apply. The Court could have decreed the suit *in toto*, or dismissed it in part, or decreed it, as it has done, subject to conditions. How that declaration in favour of Ramyad and others of a charge on the property to the extent of three thousand rupees is to be given effect to is not a question which arises on this appeal, in which we could express an opinion without further information as to the present position of the parties, which we have not before us.

It is perfectly clear that in that particular appeal no decree could and no decree could be made capable of execution as a money-decree in favor of the defendants. The parties, however, seem to have thought otherwise, and proceeded to put this decree of the Subordinate Court into execution as if it had been a decree for money in favor of the defendants; and on the objections of the so-called judgment-debtor, who in fact was the judgment-creditor, the Court decided on the 28th of May 1877, came to the conclusion that the decree of this Court really was a decree for money, and we have

1879

RAMANAGRA SINGH v. RAMYAD SINGH.

Judgment.

been much pressed with this judgment of the Judge, to whic exception was taken by the other side by way of appeal. had been a mere question of construction of a decree that before us, we should not have interfered with the constru adopted and consented to by the parties in the Court below this lapse of time. But the fact is, that the question whic have here is not a question as to the construction of a de The question, is whether there was a decree at all. No co of parties, even if supported by an order of a Subordinate C can create a decree of the High Court ; and no such decree o High Court, as the Court below supposes to have been made, any existence. Therefore, to ask us to make any order in re of the execution of a non-existing decree is to ask us to do which is impossible.

The only order that we can make at present in this appe that all proceedings in the Court below shall be stayed, and the costs of the litigation up to the present time, which hav yet been realized, be borne by the parties respectively.

[CIVIL APPELLATE JURISDICTION.]

TARINI KANT LAHIRI CHOWDHRY . . . . (INTERVENOR,) APPELLANT;

AND

KRISHNA MONI CHOWDHRANI AND ANOTHER . . . . RESPONDENTS.

1879 *August* 22*nd*.

No. 1787 of 1878.

Rent Suit—Recognised Purchaser—Benámi.

Plaintiff, who derived title from A, who was the ostensible purchaser of certain immoveable property at an auction sale in execution of a decree against B, brought a suit to recover the rent of such property from the taluqdars. The appellant was allowed to intervene, alleging that A was the benamidar of a third person from whom he himself had purchased the property. The lower Court, however, refused to try the question of *benami* as not being admissible in a rent suit. On appeal *held*, that the question of *benami* was properly raised in the suit, and ought to have been tried.

Rughoo Nath Pershad vs. *Byjnath Sahoy*, 24 W. R., 349, cited and distinguished.

APPEAL from a decision of the Officiating Second Subordinate Judge of Mymensingh, affirming the decision of the Moonsiff of Jerepore.

Baboo *Jogesh Chunder Roy*, for the Appellant.

Baboo *Kashi Kant Sen*, for the Respondents.

The facts of the case will be found sufficiently set forth in the judgment of the Court (1), which was delivered by

MORRIS, *J.* :— MORRIS, *J.*

This is a suit brought by the plaintiff as the representative in part of one Biswanath Tewari. It appears that the rights and interests of Biswanath Tewari were sold in execution of a decree against him at an auction sale, and purchased by, or in the name of one Gagun Chunder Roy. This was on the 31st of October 1870. The Courts have found that Gagun took no

(1) MORRIS and PRINSEP, *J.J.*

1879

TARINI KANT LAHIRI CHOWDHRY v. KRISHNA MOSI CHOWDHRANI

Judgment.

steps to realize rent or assert his possession of the property over which Biswanath's rights extended, and on the 20th Magh 1279, which corresponds with the 1st February 1873, he sold his interests to the present plaintiff. On the strength of this purchase the plaintiff brings this suit for rent. He is resisted by the intervenor, defendant, whom the First Court made a party to the suit on the ground that he, and not the plaintiff, was entitled to the rent, inasmuch as the interests of Biswanath Tewari were really purchased by one Goluck Nath Chowdhry from whom he derives Gagun Chunder Roy being only a benamidar or nominal purchaser for Goluck Nath Chowdhry. Both the lower Courts have refused to try the question of *benami*, holding that it is not admissible in rent suits, it being sufficient for the purposes of such a suit that Gagun Chunder is the recognised purchaser of Biswanath's interests, and that the plaintiff is the purchaser from him. In support of this position stress has been laid on the case of *Rughoo Nath Pershad Singh* vs. *Byjnath Sahoy*, 24 W. R. 349. But the case differs materially from this. Here there is no question as between the benamidar and the beneficial owner, that is, between Gagun Chunder as benamidar and Goluck Nath as beneficial owner. It is admitted that Gagun Chunder, although the recognised purchaser of Biswanath's interests at the execution sale, never exercised proprietary rights by collecting rent, &c. Consequently as between the plaintiff who derives from Gagun Chunder, and the intervenor, defendant, who derives from Goluck Nath Chowdhry, the question is fairly raised as ought to be determined, namely, which of the two is entitled to the rent. If the lower Court thought that this question of title could not be raised in a rent suit, it ought not to have admitted the intervenor, defendant, as a party to the suit, but having admitted him it ought to have tried the issue which he raised.

The case must, therefore, be remanded, in order that this issue may be determined and the case re-tried.

Costs will abide the result.

[CIVIL APPELLATE JURISDICTION.]

GOPAL SINGH (JUDGMENT-DEBTOR) . . . APPELLANT;

AND

ROY BUNWAREE LALL SAHOO . (JUDGMENT-CREDITOR). . RESPONDENT.

1879 *Sept. 6th.*

No. 86 of 1879.

Civil Procedure Code (Act X of 1877), sections 294, 306, 307 and 308—Deposit made by purchaser of immoveable property—Option of set-off when exercised—Waiver of deposit in Cash.

The requirements of section 306 of the Civil Procedure Code applying to all cases of sale of immoveable property, under Chapter XIX., a decree-holder buying with permission given under section 294, and desiring to set-off his purchase-money against the amount of the decree, is not exempt from the necessity of making, at the time of sale, a deposit of 25 per cent. on the amount of such purchase money; and such deposit must be made in cash. The option so to set-off the purchase-money cannot be exercised by the purchaser until the confirmation and payment of expenses of the sale.

Where, however, all parties interested in the amount to be deposited have waived their right to have that amount deposited in cash, the sale ought not to be set aside on the ground that a cash deposit has not been made.

APPEAL against an order of the Second Subordinate Judge of Purnea, dated 17th February 1879.

In this case the circumstances are somewhat peculiar. The appellant was the judgment-debtor under a money-decree for Rs. 7,910. The respondent was the judgment-creditor and purchaser, in execution, of the appellant's property, and the order complained of was one by which the Subordinate Judge on the application of the respondent, set aside the sale at which he became the purchaser, not on the ground of any irregularity which the decree-holder could complain of under section 311, or of the existence of saleable interest, under section 313, but on the ground that the sale had been confirmed, although the entire purchase-money had not been paid in.

The sale was fixed for the 15th May 1878, and on the previous day the decree-holder made an application to the Court for leave

1879

GOPAL SINGH v. ROY BUNWAREE LALL SAHOO.

Statement.

to bid, and at the same time expressed his intention to set-off h decree against the purchase-money as allowed by section 294.

Leave was granted and the decree-holder became the purchas for the sum of Rs. 8,100. He thereupon tendered a receipt f payment of Rs. 2,025 out of the decreed amount as represen ing the 25 per cent. on the amount of the purchase-mon required to be deposited under section 306, and this was recorde He took no further steps in the matter, but on the 6th Jul the Subordinate Judge confirmed the sale, entering up satisfa tion of the decree in full and declaring the judgment-debtor en titled to realize from the decree-holder as purchaser the sum Rs. 189-7-3 being the excess of the sum bid over the sum du under the decree.

Subsequently the respondent came in and objected to the co firmation of the sale, and, notwithstanding the opposition of th judgment-debtor, succeeded in getting the Subordinate Judge t review his order of the 6th July. And on the 17th Februar 1879 that officer cancelled the order confirming the sale, and o the same day made an order directing the resale of the propert and instructed the Government pleader to levy from the decre holder, as in execution of a decree, the amount of deposit whic should have been made under section 306.

The judgment-debtor appealed against this order on review, o the ground that the Subordinate Judge had no power to revie his order of 6th July; or, if he had such power, that under th circumstances the order confirming the sale ought not to ha been set aside at the instance of the judgment-creditor.

Baboo *Mohesh Chunder Chowdhry*, for the Appellant.

Branson, Baboo *Madhub Chunder Ghose* and Mr. *M. L. San* for the Respondent.

The following judgments were delivered by the Court (1) :—

BROUGHTON, *J.*:—

The plaintiff in this case obtained a decree on the 22nd June 1876, for Rs. 7,910, and in execution of that decree

(1) AINSLIE and BROUGHTON, *J.J.*

1879

GOPAL SINGH v. ROY BUNWAREE LALL SAHOO.

Judgment.

BROUGHTON, *J.*

attached the property of the judgment-debtor. On the 14th of May 1878 the judgment-creditor asked permission, under section 294 of the Code of Civil Procedure (Act X of 1877), to purchase the property himself. He obtained permission, and upon the 15th of May he did buy the property at the sale in execution. Thereupon he put in a receipt for 25 per cent. of the amount of the purchase-money, but he took no further steps to carry out the sale.

The 306th section of the Code provides that on every sale under Chapter XIX the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent. on the amount of his purchase-money to the officer conducting the sale.

The officer conducting the sale was, therefore, not directed to take the purchaser's receipt for the 25 per cent. He ought to have been paid the amount in cash, and this money would, under section 308, have been forfeited to Government if the sale had not been completed; and the fact that the decree-holder (being the purchaser), is entitled to set-off the amount of his purchase-money against the amount of his decree makes no difference in this respect. This adjustment must be made afterwards, and the fees for conducting the sale must be realized before the adjustment is made. Unless this is done the officer conducting the sale has no power to realize those fees.

That, however, is a matter which does not concern the judgment-debtor, if the creditor chooses to set-off his purchase-money against his debt and thereby authorises the Court to enter up satisfaction for him. The judgment-debtor is released from the debt, and cannot be subjected to further process in execution for the purpose of realizing anything more upon the decree.

The judgment-creditor having taken no further steps to carry out the sale, the judgment-debtor, on the 17th of June 1878, applied to have it confirmed, and after objection taken by the judgment-creditor, it was confirmed on the 6th of July 1878. The judgment-debtor agreed to take steps on his own account to realize from the judgment-creditor the small excess of the further money over the amount decreed against him in his own way, and did not insist upon demanding its payment into Court by the judgment-creditor.

1879

GOPAL SINGH v. ROY BUNWAREE LALL SAHOO.

Judgment.

BROUGHTON, *J.*

The judgment-creditor could not apply to have the sale set aside under section 311 on the ground of irregularity, for he had sustained no injury—nor could he apply as purchaser under section 313 to have it set aside, for the property was the property of the judgment-debtor; but he applied for a review of the order confirming the sale under section 623, and it is contended on his behalf that under section 308 the order confirming the sale was a wrong order, because the full amount of the purchase-money, namely, the small excess, had not been paid into Court.

It appears to me that there are two answers to this contention: First, it was the duty of the judgment-creditor to pay that small excess when he bought the property, and as the effect of setting aside the sale would be to give him an advantage in that his debt would be bearing interest subsequent to the sale, it would be giving him an advantage from his own neglect if the sale were now set aside; and, even if it ought to be so set aside, it appears to me that it ought to be set aside on terms, and that the judgment-creditor should not be allowed any interest after the date of the sale.

But the only persons interested in the payment of the excess or in any cash payment are the Government as represented by the officer conducting the sale and the judgment-debtor, and they have both waived any objection there may have been to the non-payment in cash. The Government has waived it by accepting a receipt for the 25 per cent. instead of a deposit in cash and the judgment-debtor has waived it in express terms by undertaking to realize the balance in some other way.

It appears to me, therefore, that the order confirming the sale was perfectly regular, and that the order on record was erroneous and that the latter order ought to be set aside and the former reinstated.

AINSLIE, *J.*:—(after re-stating the facts, proceeded as follows):—

The judgment-debtor has contended that the Subordinate Judge had no power to review his order of 6th July, and, if he had such power, that he ought, under the circumstances, to have held the decree-holder to his bargain.

As to the first point, it appears to me that the case clearly came within the provisions of section 623 of the Proced

Code. The application was founded on an error apparent on the face of the record, and as the Subordinate Judge recognized the existence of such error, he had authority to review his order.

The main question in this appeal is this,—whether the order confirming the sale was made *ultra vires*, and is null and void as wholly inconsistent with the provisions of sections 307 and 308.

The first of these sections requires the full amount of purchase-money to be paid not later than the fifteenth day after the sale, unless such day be a Sunday or other holiday; and the second directs that in default of payment within the period mentioned, the deposit made under section 306, after defraying the expenses of the sale, shall be forfeited to Government, and the property shall be re-sold, &c.

It is contended that this is a peremptory rule which leaves no discretion to the Court, even in cases in which the judgment-debtor is content to stand by the sale, as in this case, in which he wishes the sale to stand good and the purchase-money to be set-off against his debt, he taking his chance of being able to recover the surplus of Rs. 189.

Such a case as this could not have been contemplated by the Legislature, and but for the erroneous view of the effect of section 294, taken by the Court below, it is hardly possible that the question before us could have arisen.

The Subordinate Judge has taken section 294 by itself, without reference to the other provisions of the Code, and has given it an effect nullifying sections 307 and 308, which a little consideration would have shown him to be erroneous. The words of section 294 do not warrant the course adopted. There is no provision for allowing a part of the decree to be set-off against a part of the purchase-money.

The whole amount due under the decree may be set-off against part of the purchase-money when the latter exceeds the former or the whole of the purchase-money may be set off against a part of the decree, when the purchase-money is less than the decree. It is, however, obvious that this cannot be done until the sale is confirmed, as the judgment-debtor has a right to question the sale (under section 311) on the ground of irregularity causing substantial injury at any time within 30 days from the date

1879

GOPAL SINGH v. ROY BUNWAREE LALL SAHOO.

Judgment.

AINSLIE, J.

of sale (Art. 166, Sch. II., Act XV of 1877;) and so long as it is uncertain whether there has been a valid sale it is not within the competency of the Court to make any definite set-off.

Again the provisions of section 308 show that the deposit of 25 per cent. required by section 306 does not necessarily go to the credit of the judgment-debtor. Whether it is to do so at all or is to be forfeited to Government depends upon the further action of the purchaser. If he fails in paying up the full amount of purchase-money the deposit is forfeited, and except so far as it is applied to paying the expenses of the sale, no part of it is to be taken as paid to the credit of the judgment-debtor, and therefore no part of it is available to satisfy the claim of the judgment-creditor, as it is uncertain, until the purchaser completes his purchase, whether the deposit is available to the debtor to satisfy his creditor it is clearly premature to make a set-off in respect of it. What the Subordinate Judge has done in this case is to set-off against the claim of the judgment-creditor money which by his own subsequent order he has in effect declared to have been incapable of being so applied, inasmuch as it ought to have been forfeited to Government.

The sections of the Act must be read together and construed so as to give effect to every part, and a construction which nullifies any portion can only be accepted, if at all, when the language is such as to admit of but one interpretation.

There is nothing in section 294 which requires or authorises partial set-off (that is, of part of the purchase-money against part of the amount of the decree) or which fixes the time or times at which the decree-holder's option is to take effect as the times when the deposit and balance of the purchase-money are due under sections 306 and 307.

In the absence of express words to the contrary it must be held that the time when such option is to take effect is the time of confirmation at which, by the order of confirmation the amount of the purchase-money first becomes available assets to the debtor, the set-off when made takes effect by virtue of the section and the order of the Court, and the taking a receipt from the judgment-creditor is a formality adopted

many Courts not only superfluous but positively mischievous, as it leads to the belief that something depends thereon.

The provisions of section 308 are not intended solely for the benefit of the parties to the execution suit. The Legislature has thought fit to adopt most stringent measures to deter persons having no *bonâ fide* intention of buying from wasting the time of the Courts and interrupting their proceedings by pretended purchases, and there is no reason why a purchaser should be preserved from the operation of this rule because he happens to be also the decree-holder.

It is thus, in my opinion, clear that the requirements of section 306 apply to all cases of sale of immoveable property, and that decree-holders buying with authority given under section 294 and desiring to the set-off the purchase money against the decree, are not exempt from the necessity of making a cash deposit.

The amount of this deposit is determined by the words of section 306 of the Code.

It may be that the amount is capable of reduction under a rule framed by virtue of the authority vested in the High Court by section 652, and for my own part I think it can be so reduced, and that a rule consistent with the Code can be framed securing the intention of the Legislature, which I understand to be to prevent pretended purchases by persons who have no intention of completing their bargain, without imposing on a creditor making a *bonâ fide* purchase of his debtor's property at a sale held in execution of his own decree, the burden of invariably depositing in Court a sum of money which must of necessity in many cases return to himself.

But even if such a rule can be framed none has been yet made, and the Courts are therefore bound by the letter of the law as it stands.

But I agree with Mr. Justice BROUGHTON in thinking that the application of the rule in section 308, which was pressed upon us absolute, may be waived by the parties concerned. These are three—the judgment-creditor at whose instance the sale was held, and other judgment-creditors entitled to share in the proceeds, the judgment-debtor, and the Government.

1879

GOPAL SINGH v. ROY BUNWAREE LALL SAHOO.

Judgment.

AINSLIE, J.

In the present case the judgment-creditor being the defaulter can found no claim in his own default, and there are not, as far as we know, any other creditors interested in the sale. The judgment-debtor elects to stand by the sale, taking the satisfaction entered up on the decree as payment to the extent thereof, and taking his chance of being able to recover the small balance of Rs. 189 by what procedure he can get this, if at all, does not concern us now. The sale standing good, a claim on behalf of the Government to a forfeiture as for a failure to complete the purchase would have no foundation, and as a matter of fact there is no deposit whatever, for the order made by the Subordinate Judge for realizing money from the defaulter in order that on realization it may be forfeited on a separate application by the judgment-creditor we declare to be illegal, so that we are not dealing with any fund in which the Government has an interest. I therefore concur in reversing the order of the Subordinate Judge and confirming the sale.

The appellant will recover costs of this appeal, and of the proceedings in review in the Court below.

[CIVIL APPELLATE JURISDICTION.]

JOGUN CHUNDER SIRKAR (DECREE-HOLDER) . . . . . } APPELLANT;

AND

. W. LAIDLAY AND OTHERS (JUDGMENT-DEBTORS) . . . . . } RESPONDENTS.

1879 *August* 15*th*.

No. 50 of 1879.

tay of Proceedings pending Appeal subsequently dismissed—Execution of decree for possession merely—Mesne Profits from time of execution stayed.

Execution of a decree for possession merely of certain land having been stayed, and the defendant, pending an appeal to the Privy Council, continued in possession by the High Court, upon his giving security for the "due performance of such order as might be made by the Privy Council," the appeal was subsequently dismissed, no order being made as to mesne profits.

Held, on the authority of the case of *Sadasiva Pillai* vs. *Ramalinga Pillai*, 24 W. R., 193, that under the circumstances, the decree-holder was entitled to mesne profits from the date of the decree until he was put in possession; that the amount of such profits should be determined by the execution department.

See, however, the case of *Forester* vs. *The Secretary of State*, L. R. I. A., 137.

APPEAL against an order of the District Judge of Rajshahye. This was an application to ascertain mesne profits, &c., of a rtain property which, after lengthened litigation, had been finally judged to the applicant.

In the original suit for possession there was no claim for ne profits, nor were any awarded by the decree; but on the ree-holder attempting to execute his decree the judgment-tor prayed the High Court, pending an appeal to the Privy ncil, to stay execution, and to continue him in possession his giving security to account for all profits, receipts, &c., a fixed date. The order of the High Court was, that exe- would be stayed on the judgment-debtor giving security . 20,000 "to carry out the order that might ultimately be by Her Majesty in Council, and for the due performance order as Her Majesty in Council may be pleased to pass."

1879

GOGUN CHUNDER SIRKAR v. LAIDLAY.

Judgment.

The Privy Council dismissed the appeal, but made no o as to mesne profits.

The lower Court held that the applicant must be kept stri to the terms of the order of the High Court, and accordi refused to grant the application.

The decree-holder thereupon appealed on the ground that proceedings taken by the judgment-debtors placed them unde obligation to account for the mesne profits which was capab being enforced by proceedings in execution.

Baboo *Sree Nath Dass*, and Baboo *Mohiny Mohun Roy*, fo Appellant.

Baboo *Unnoda Prosad Banerjee*, and Baboo *Bhowany C Dutt*, for the Respondents.

The following judgment of the High Court(1) was delivere

MORRIS, *J.* MORRIS, *J.* :—

We are of opinion that the Judge has taken an erroneous v of the order of this Court, dated the 1st of April 1870. plaintiff, decree-holder appellant, having obtained a decre this Court, asked to be put into possession. Thereupon the j ment-debtors put in a petition praying that execution migh stayed pending an appeal that they were to make to the P Council. Their petition was in these terms :—"Your petitio therefore pray your Lordships will please to order that on petitioners giving security to the satisfaction of the lower C to indemnify the said Ranee Shurut Soondury for the rents profits received or come to the hands of your petitioners since 12th day of February 1868, and hereafter to be received pen the result of the said appeal to Her Majesty's Privy Council execution for possession of the said properties abovena be stayed."

Thereupon this Court passed the order that the defendant allowed to retain possession on their giving security to the ex of Rs. 20,000, and that pending the result of the appeal to Majesty in Council all proceedings in execution of the decr stayed.

(1) MORRIS and PRINSEP, *J.J.*

1879

GOGUN CHUNDER SIRKAR v. LAIDLAY.

Judgment.

MORRIS, *J.*

The Privy Council on appeal affirmed the order of the High Court. Thereupon the decree-holder asked that mesne profits, which accrued from the date of the decree to the date of taking possession, should be determined and made over to him. The lower Court however has not allowed mesne profits to be assessed, inasmuch as it conceives that the judgment-debtors only bound themselves to carry out the order of the Privy Council, and that as no order was passed by the Privy Council relative to the mesne profits, the decree-holder was not entitled to them. It therefore rejected his application.

We think that this case should be decided on the authority of the very similar case of *Sadasiva Pillai* vs. *Ramalinga Pillai*, reported in 24 W. R., 193. In that suit, as in this, the judgment-debtors contracted an obligation to account for subsequent profits that might accrue during the pendency of the appeal. Their Lordships in the Privy Council held, that this liability made the "accounting a question relating to the execution of the decree" within the meaning of the latter clause of section 11, Act XIII of 1861. But even if it did not, they think that "upon the ordinary principles of estoppel, the respondent cannot now be heard to say that the mesne profits in question are not payable under the decree."

Under these circumstances, we think that the order of the lower Court must be reversed, and the Court in the execution department directed to determine and assess the mesne profits that the decree-holder is entitled to realize from the date of the decree to the date of being put into possession.

The appellant is entitled to his costs in this Court and in the lower Court.

[CIVIL APPELLATE JURISDICTION.]

1879
August 22*nd.*

No. 400 of 1878.

MUTURA KANTO SHAHA CHOWDHRY (PLAINTIFF) . . . . . } APPELLANT;

AND

MEAJAN MUNDUL AND OTHERS (DEFENDANTS) RESPONDENTS.

Alluvion—Accretions formed during term of lease from Government, Right to rent of.

The lessee of a mouzah ordinarily being in the position of zemindar, a lessee holding lands from Government, in the absence of any stipulation in his lease to the contrary, is entitled to the benefit of all accretions formed upon such lands during the term of his holding, and may sue the occupants for a fair and equitable rent.

APPEAL from a decision of the Second Subordinate Judge of Mymensing, affirming the decree of the Moonsiff of Attiah.

Woodrooffe, Baboo *Kali Churn Banerjee*, and Baboo *Tarini Churn Bhuttacharjee*, for the Appellant.

Baboo *Sreenath Banerjee*, for the Respondents.

The facts are sufficiently set forth in the following judgment of the High Court (1) which was delivered by

MORRIS, *J.* MORRIS, *J.* :—

The plaintiff claims, as lessee under Government, to the extent of the 12 annas of the villages of Hafania, Bhalta and Pathrail and Agshimolia and Modhya Shimolia. He brings these three suits for rent of certain lands within them. He alleges that these lands have been thrown up as accretions during the time of his lease, and that he is entitled to rent for the occupation of them by the defendants. The lower Appellate Court has dismissed the suit mainly on the ground that there is nothing to show that these accreted lands are covered by the ijara lease. In the words of the judgment, "If accretion is made to the plaintiff's ijara, he the plaintiff, in my opinion, is not entitled

(1) MORRIS and PRINSEP, *J.J.*

1879

MUTURA KANTO SHAHA CHOWDHRY v. MEAJAN MUNDUL.

Judgment.

MORRIS, *J.*

to possess the same unless there be any condition to that effect in the ijara pottah and kabuliut, and there is no proper reason for it."

We are unable to concur in this view of the lower Court. If it is established that these lands appertain to the villages leased to the plaintiff, and came into existence as accretions during the term of his lease, he is entitled to rent on account of them. It is for the defendant to show that in the contract of lease there is a special stipulation which bars the right to the plaintiff to such accretions. Ordinarily the lessee of a village stands in the position of zemindar; and consequently is entitled to all the rights incidental to the zemindari. These cases must, therefore, go back, in order that the lower Court may determine whether, as a matter of fact, these lands are accretions to the villages held in lease by the plaintiff. If they are, and if the defendants are unable to establish an independent title in them, the plaintiff is entitled to an equitable rate of rent for their occupation by the defendants. If, as we understand, the defendants set up the defence that these lands are covered by a certain pottah granted to them by the Collector of Pubna, and this fact is established by evidence, then the plaintiff cannot obtain a decree in this suit.

Under such a state of things the plaintiff could only then properly sue the Government the common lessor of himself and the defendants, for having diverted these lands from these villages to which they naturally appertain, and so deprived him of substantial advantage, which as incidental to his lease he is entitled to enjoy.

Costs will abide the result.

[CIVIL APPELLATE JURISDICTION.]

1879. June 18th.

SHEO SUNKER SAHOY (DEFENDANT) . . . APPELLANT;

AND

HURDEY NARAIN SAHU (PLAINTIFF) . . . RESPONDENT.

Registration Act, VIII of 1871, *sections* 49 *and* 60—*Document purporting to be registered—Evidence.*

Where a document, which purports to have been registered, is tendered in evidence, the Court cannot reject it for non-compliance with the Registration Law, but it can deal with all other objections brought against it on their merits.

APPEAL from a decision of the First Subordinate Judge of Tirhoot, dated 19th December 1877.

In this case the plaintiff sued to establish a right of ticcadares bharna, and to obtain possession of certain properties by completion of a *bonâ fide* contract of ticca zuripeshgee bharna under a lease, dated the 23rd of Sawan 1282 F.S., executed and delivered by the defendant. He alleged that the defendant contracted to give him a lease for a consideration of Rs. 30,000 bearing interest at 12 per cent. per annum, on an annual jumma of Rs. 3,714-4-5 for a term of eleven years, from 12[illegible] to 1293, and that the plaintiff, after paying the Government revenue and dâk cesses out of the fixed amount of rent, was to appropriate the balance of the rent for payment of the interest on the zuripeshgee money; that he accordingly accepted the terms; and that the defendant in due form executed the lease and delivered the same to the plaintiff, and the plaintiff executed a kabooleut in the usual form and delivered it to the defendant. He goes on to say that subsequently the defendant, when by the act of the plaintiff he had been released from payment of the sum of Rs. 30,000 to Goburdhun Lall and Bhugbut Pros[illegible] bankers of Mozufferpore, turned round and repudiated the transaction, and did not pay any attention to the request of the plaintiff's mooktear for his appearing before the Registrar and causing registration of the pottah and kabooleut, but [illegible]

various excuses, till at length the mooktear, in order to have the pottah registered, filed it in the office of the Sub-Registrar of Bahera; that the defendant still abstained from appearing and causing the documents to be registered, but was brought in by compulsory process and then made false allegations as to alterations in the lease originally granted by him; that he wilfully kept back the kabooleut and did not produce it for registration. The plaintiff further states that the defendant has received the full amount of the consideration money by satisfaction of the debt due by him to the bankers aforesaid, and that his allegation that the completion of the ticca zuripeshgee kharna transaction was dependent on the grant by the plaintiff to him of the kutkina of the property, was false and untrue. He then says that no doubt he had promised to lend the defendant Rs. 10,000 under a bond, but that as the defendant did not cause that bond to be registered and delivered to the plaintiff, the amount had not been advanced.

The defendant in his written statement set up several pleas, the first of which was that the registration of the lease was defective, and that the plaintiff had no right according to law to sue for possession of immoveable property on the basis of this document; *secondly*, that besides the conditions contained in the lease propounded by the plaintiff, there were other conditions. He says that the contract entered into by himself and the plaintiff was that he would let the property to the plaintiff in ticca on an annual jumma of Rs. 3,714-4-5 on receiving Rs. 30,000 from the plaintiff, and on the condition that the plaintiff should sub-let the ticca property to him at an annual rental of Rs. 4,500, and that there was also a further condition that the plaintiff should advance the sum of Rs. 10,000, bearing interest at 12 per cent. per annum. The defendant states that all the [illegible] instruments necessary to give effect to these conditions were [illegible]d and executed, except the bond for Rs. 10,000, which was [illegible]red, but remained unsigned by him, as the arrangement was [illegible]he money should be paid in the Registry Office at Bahera; [illegible]ngwan Jha, the agent of the plaintiff at the Registry [illegible]demanded of him Rs. 2,000 and a four annas share in the [illegible], and on that demand being made, he refused to go on

1879

SHEO SUNKER SAHOY v. HURDEY NARAIN SAHU.

Statement.

with the registration of the document. The defendant then alleges that the lease had been altered. He says: "Your petitioner got information that the mooktear having changed the sheet of plain paper which was pasted to the stamped paper on which the pottah was written, and put down several conditions suitable to his own purpose, your petitioner for these reasons was unwilling to cause the registration of the said pottah alone." He then urges that, as the plaintiff had wilfully failed to carry out the terms of the contract in respect of the kutkina, he was not entitled to sue upon the lease. He denies that the lease and the corresponding kabooleut were ever delivered by the parties to each other; and then in the 6th paragraph of his written statement he says that the allegation of the plaintiff that relying upon the delivery of the pottah and kabooleut and at the request of the defendant and in accordance with the conditions contained in the ticca pottah he paid the sum of Rs. 30,000 to Roy Goburdhun Lall and Bhugbut Proshad, bankers of Mozufferpore, is untrue; and that he never made any such request, and the pottah contained no condition that the amount should be paid to the aforesaid bankers, but it provided that the money should be paid to the defendant himself to discharge the debt due to those persons. He then proceeds to say that these bankers are connections of the plaintiff, and that the entry of the sum of Rs. 30,000 to the credit of defendant in the accounts at Mozufferpore is collusive.

The finding of the Subordinate Judge was: *firstly*, that the fee of registration was sufficient to allow the document to be tendered in evidence; *secondly*, that the statements of the defendant with regard to the substitution of a sheet of plain paper for the originally attached to the stamp paper on which the greater part of the deed was written, was false; and, *thirdly*, that the money was actually paid by the plaintiff to the bankers at the request of the defendant. Consequently he made a decree declaring the right of the plaintiff to recover possession of the property covered by the lease, with costs of the suit.

The defendant appealed on the following grounds, viz:—

First, that the registration is defective, and that the plaintiff was not entitled to sue upon the lease produced; *secondly*, that

execation of the document, *as now produced*, was not proved; *thirdly*, that no consideration passed; and, *fourthly*, that the terms of the contract between the parties were not as stated by the plaintiff, but that they included as part of the consideration the grant of a kutkina and the advance of Rs. 10,000 on a bond.

Branson (Baboo *Unnoda Persad Banerjee*, and Baboo *Mohesh Chunder Chowdhry* with him) for the Appellant.

Woodroffe (Mr. *R. E. Twidale*, and Moonshee *Mahomed Yusoof* with him) for the Respondent.

The following judgments were delivered by the Court (1) :—

AINSLIE, *J.* (after stating the facts) :— AINSLIE, *J.*

At the time that this suit was brought the Registration Act, VIII of 1871, was in force. Section 49 of that Act forbids the Courts to accept or act upon documents of certain classes unless they are registered in accordance with the provisions of the Act.

The question then arises whether, when a document purporting to have been registered is tendered in evidence, the Court is to accept it on the strength of the certificate of registration endorsed upon it; or whether it is to satisfy itself that the registering officer has strictly conformed to all the provisions of the Act. It appears to me that the Court is to accept the certificate of registration. In section 60 it is laid down that a certificate of registration, being signed, sealed and dated by the registering officer, shall then be admissible for the purpose of proving that the document has been duly registered in the manner provided by the Act. It may be that on proof that the Registrar had been deceived and by a fraud practised on him (*e.g.* by false personation) had been induced to make a certificate which, but for that fraud, he could not have made, the Court would hold the certificate void and the document bearing it inadmissible for want of registration; but where, as in this case, it is admitted that the certificate was the intentional and deliberate act of the Registrar, done with knowledge of what is alleged as rendering it void, in my

(1) AINSLIE and BROUGHTON, *J.J.*

1879

SHEO SUNKER SAHOY v. HURDEY NARAIN SAHU.

Judgment.

AINSLIE, J.

opinion the Court cannot go behind it. The Registrar may have been mistaken in supposing that he ought to register the document, but nevertheless his certificate is under section 60 sufficient to meet any objection under section 49. Refusal by a Sub-Registrar to admit a document to registration may be questioned by an appeal to a Registrar; and refusal by a Registrar may be questioned by a petition to the District Court; and there is no provision in the law for revising orders for the admission to registration of a document. The Act makes no provision for altering such orders, and they are consequently final, and the reason for the difference is obvious. The object of the Act is to guard against fabrication of false documents of title from time to time, as the temptation to manufacture there arises by insisting that all documents of certain classes shall be produced for registration within a limited period of time from the date of execution, and shall be entered in public registers after their execution has been ascertained. So that their purport and conditions being thus fixed, they may not afterwards be open to be tampered with. Registration does not do away with the necessity of proof, except so far that where a person admits that he has registered a document he cannot well deny its execution, but he may deny its validity whether on the ground that he was deceived into executing it, or that the conditions have not been complied with by the person seeking the benefit of it, or any other ground on which a person may claim to be relieved from the operation of the engagement, and of course he may deny both execution and registration, or he may admit the former or deny the latter. In these two last cases he in effect asserts that a fraud has been practised, not only on himself but on the registering officer, and if he can succeed in establishing this, the Registrar's certificate becomes of no effect. Thus the Act, which in section 49 invalidates documents for none registration, provides remedies for improper refusals to register, but leaves documents when once registered to be dealt with on their merits by the Courts.

[The learned Judge here examined the evidence as to the contracts and the alleged alterations in the document, and concluded as follows :—]

I am, therefore, of opinion that the plaintiff, having performed his part of the agreement, is entitled to compel the defendant to perform his part of it.

The appeal must be dismissed with costs.

BROUGHTON, *J.* :—

I am entirely of the same opinion.

With regard to the objection that the document, which is the subject of this suit, has not been properly registered, and could not be received in evidence, it appears to me that when a document is presented for registration the Registrar has a duty to perform which involves an enquiry by him as to whether he should register it or not. Having performed that duty, and having done the act required by the Legislature, it is not possible for us, in the absence of any power for reviewing the act of the Registrar, to go behind it. When a document, which purports to have been registered, is tendered in evidence, the Court cannot reject it for non-compliance with the Registration Law, but can deal with all other objections against it on their merits.

With regard to the facts of the case, after the careful manner in which they have been dealt with by my learned colleague in the judgment which he has just delivered, I have nothing to add.

But one point does strike me as remarkable. The defendant says that five documents, namely, a ticca pottah, a ticca kabooleut, a kutkina pottah, a kutkina kabooleut and a bond for Rs. 10,000 were all executed together, and at the same time he states that the ticca pottah contained a recital that a kutkina was to be granted. It is very singular that the ticca pottah should contain this recital the kutkina pottah had been written, engrossed and executed the same time.

[CRIMINAL REVISIONAL JURISDICTION.]

1879 September 9th. IN THE MATTER OF CHUTRAPUT SINGH . PETITIONI

No. 186 of 1879.

Criminal Procedure Code, (Act X of 1872), section 530—Possession, bolical, under decree of Civil Court, Effect of—Jurisdiction.

A certain mouzah having been sold in execution of a decree ob upon a mortgage, the purchaser claimed a right under the sale haut appurtenant to the mouzah, and was put by the Nazir of the Court into symbolical possession of the haut as well as of the mo The judgment-debtor refused to give up actual possession of the maintaining that it was debutter property of which he was the sh A breach of the peace being imminent in consequence of the claims, proceedings were taken under section 530 of the Cri Procedure Code, and the Magistrate finding that the judgment-d was in actual possession of the haut made an order maintaining in such possession until ousted by a Civil Court.

Held (setting aside that order) that the Magistrate had no under section 530 of the Criminal Procedure Code, to direc judgment-debtor to be retained in possession until ousted by a Court, but was bound to see that the possession, as given by the M was maintained, leaving it to the debtor to substantiate his cla shebait in a Civil Court.

The Court accordingly directed that the purchaser be restored t session, and that the Magistrate do see that he is kept in poss until ousted by due course of law.

RULE to show cause why an order of the Magistrat Howrah, dated 10th July 1879, should not be set aside.

The circumstances under which the order was made v these :—Rajah Girendro Chunder Roy held, with another mem of the same family, Rajah Purna Chunder Roy, in Bali, one the mouzahs in Lot Mahammad Aminpur. He mortgaged Lot to Durga Charan Lala, and on the latter foreclosing mortgage the whole property was sold and bought by Chutr Singh. In the village of Bali it appears a daily haut was h and Chutraput Singh claimed to have acquired this with purchase of the Bali mouzah. Rajah Girendro denied this haut passed by the sale, claiming it as his debutter pro

1879

In re CHUTRAPUT SINGH.

Statement.

and maintaining that he and his co-sharers were in possession of it as such, before the execution proceedings, and that they had held possession ever since.

In consequence of the endeavours of Chutraput Singh to assert his alleged right, a breach of the peace appeared to be imminent, and proceedings were therefore taken by the Magistrate under section 530 of the Code of Criminal Procedure. Evidence was gone into on both sides, and it was found that the proprietary rights in the haut were exercised by daily collections in cash and kind (*dan* and *tola*) from persons offering their goods for sale at the haut, and that contributions of both cash and kind had been collected daily on behalf of Rajah Girendro Chunder Roy.

The Nazir, who had been directed by the Civil Court to give possession in execution of the decree obtained by Durga Charan Lala, gave evidence to the effect that he had given possession to the purchaser Chutraput Singh by planting a bamboo and beating a drum. The bamboo was not planted in the haut, but a proclamation, he said, was made in the haut, declaring that the share therein of Rajah Girendro Chunder Roy had passed to Chutraput Singh.

The Magistrate, however, refrained from coming to any conclusion upon the Nazir's evidence as to whether symbolical possession had been given of the haut; and, on the 10th July 1879, made an order in the following terms:—"I can have no doubt that, as a matter of fact, Rajah Girendro Chunder Roy has been since the Nazir gave possession of the zemindari in actual enjoyment of his former rights in the bazar, and I accordingly declare that Rajah Girendro Chunder Roy is entitled to retain possession of the 5 annas share in Bali Bazar until ousted by due course of law, and I forbid all disturbance of possession till such time."

Chutraput Singh then applied to the High Court to have this order set aside.

The application was heard before Mr. Justice AINSLIE and Mr. Justice BROUGHTON, and by them a rule was granted calling upon Rajah Girendro Chunder Roy to show cause "why the Magistrate should not be directed to make further enquiry, and determine whether the Civil Court did or did not give possession to the petitioner."

1879

In re CHUTRAPUT SINGH.

Argument.

This rule came on for hearing before Mr. Justice Morr and Mr. Justice PRINSEP.

Baboo *Sreenath Dass*, and Baboo *Rashbehary Ghose*, for t Petitioner.

M. Ghose, and Baboo *Bhowani Churn Dutt, Jr.*, shewed caus

M. Ghose.—Further enquiry, as suggested by the rule, unnecessary on this point, as even upon the assumption th the formal possession was given to the petitioner by the Ci Court Nazir, the Magistrate was competent to find upon t evidence, as he has done in this case, that at the time of t institution of this proceeding we were *de facto* in possession.

[MORRIS, *J.*—We think the rule ought not to have been limited one, but as we did not grant it, we should like to cons with the Judges, who did, and then decide whether we ought hear the case.]

The learned Judges, after consultation with AINSLIE a BROUGHTON, *J.J.*, directed that the rule as originally granted discharged, and of their own motion ordered that a fresh r should issue calling upon Rajah Girendro Chunder Roy to sh cause why the order of the Magistrate maintaining him in p session should not be set aside, and proper orders passed in t case.

On this new rule coming on for hearing, M. Ghose (Bran with him) again appeared to show cause.

M. Ghose.—The Magistrate has distinctly found upon evide that we are in possession of the *haut*, which we allege to debutter property.

[PRINSEP, *J.*—But the Magistrate was bound to maintain t other side in possession, as the Civil Court had ordered pos sion to be given to him.]

I submit the Magistrate has nothing to do with the order the Civil Court in a matter like this, but has to find who i actual possession.

[PRINSEP, *J.*—Your property has been sold, and purchased the petitioner, if you have any claim you ought to go t Civil Court.]

1879

In re CHUTRAPUT SINGH.

Argument.

I submit your Lordships sitting as a Criminal Court have nothing to do with the rights of the parties, and that the Magistrate has very properly excluded from his consideration the rights of the parties.

[PRINSEP, *J.*—But the Magistrate was bound to act in conformity with the orders of the Civil Court.]

I submit that there is nothing in the law to warrant the Magistrate in so acting, unless there has been a decree *inter partes* declaring the right to possession.

[PRINSEP, *J.*—You are the judgment-debtor, and if the *haut* is debutter property, you ought to bring a suit to establish your right.]

This Court, I submit, has simply to see, whether the Magistrate's order is within his jurisdiction, and whether there is any evidence to support it.

[PRINSEP, *J.*—We must see that substantial justice is done.]

I submit that it is the province of the Civil Court only to see whether our possession is rightful.

[MORRIS, *J.*—Do you contend that the Magistrate is not bound by an order of the Civil Court?]

I contend that as a matter of law the Magistrate is not bound by any order of the Civil Court, and must decide the question of actual possession irrespective of any such order.

[PRINSEP, *J.*—Are you aware of a case in 16 W. R., in which the contrary has been held.]

I was about to cite and distinguish it from the present case. That was the case of *Rai Mohun Roy* vs. *Wise*, 16 W. R. Cr., 24, in which a decree for possession had been made by the Civil Court as between the parties to the proceedings in the Criminal Court, and the Court held that the Magistrate ought to be guided by the terms of that decree.

It is not necessary for me to question the soundness as a matter of law of that decision, for there is a manifest difference between that case and the present. Here we say that the haut was debutter property could not have been sold, and consequently could not have been legally made over to the auction-purchaser; we further say that, as a matter of fact, as found by the Magistrate, we never gave up possession of the haut.

1879

In re CHUTRAPUT SINGH.

Argument.

[PRINSEP, *J.*—But the Nazir says that when he planted the bamboo he included the haut also.]

We say that the haut was not included; but even if it was included, the question whether it was rightly included has yet to be decided by the Civil Court. If a Magistrate were bound as a matter of law to hold that irrespective of the fact of actual possession, the party in whose favor the Nazir chose to plant a bamboo must be maintained in possession under section 530, his decision would virtually depend upon the word of the Nazir or his peon.

In the case of *Nobin Chunder Koondoo* vs. *Jogendra Nath Bhuttacharjee*, 25 W. R., Cr., 18, it was distinctly held by GLOVER and MITTER, *J.J.*, that the act of a Civil Court peon delivering over possession of the disputed land to the purchaser does not take away the power of a Magistrate to enquire into the question of possession under section 530.

[PRINSEP, *J.*—There is a case the other way in 25 W. R. Cr., 46.— *Sonai Sardar* vs. *Bukhtar Sardar*.]

That is a very different case; there there was a conviction for mischief, and the Court refused to interfere.

[MORRIS, *J.*—But the case you have cited is really against you, for the first party in that case was wholly unconnected with the proceedings in the Civil Court. Here you were a party in the civil suit.]

I submit that does not really distinguish the case, for we claim as shebait, and the whole question in the civil suit will be whether our claim is well founded.

Suppose the first party in the case in 25 W. R., Cr. 18, were only a benamidar for the judgment-debtor, would the proof of that fact have taken away the Magistrate's jurisdiction? I submit that there is a clear distinction between a case in which the Civil Court has made a decree for possession *inter partes* and a case where the right to possession is yet open to litigation.

In a very recent case tried by GARTH, *C.J.*, and KEMP and BIRCH, *J.J.*,—*Sheikh Munglo* vs. *Durga Narain Nag*, 25 W. R. Cr. 74—it was held that symbolical possession, though entitled to consideration, was not entitled to weight as against a party proved to be in actual possession (see page 80). KEMP, *J.*, indeed

xpressed his opinion that symbolical possession would be no vidence such as a Magistrate could proceed upon, in enquiring nd deciding upon which party was in actual possession of the ubject of dispute.

[MORRIS, *J.*—We can set aside the finding of the Magistrate f we find it is against the evidence.]

I submit not. Under section 297, Code of Civil Procedure, your ordships cannot interfere in this case, unless you are prepared o hold that, as a matter of law and irrespective of the evidence, he Magistrate was bound to maintain the other side in possession.

The other side was not called upon.

The judgment of the High Court (1) was as follows :—

The subject of dispute in this case is a certain Haut Chandni ppurtenant to the village of Bali. On the 23rd June last, upon he petition of one Prosunno Coomar Chuckerbutty on the part f Girindro Chunder Roy, who complained of the threatening onduct of the servants of Chutraput Singh, the opposite-party, n connection with the haut, the Magistrate instituted proceedings under section 530 of the Criminal Procedure Code. Chutraput Singh alleged that in execution of a decree of the Civil Court the zemindari properties of Girindro Chunder Roy were ut to sale and purchased by him on the 9th December 1878 ; that mongst these were the village of Bali, together with its Haut handni ; and that in the month of Choit last, that is, in the course f March and April 1879, the Nazir of the Court put him in possession of these properties including Bali with its haut.

On the other hand Girindro Chunder Roy, whilst admitting hat the zemindari properties had passed into the hands of hutraput Singh, and not denying the allegation of Chutraput ingh that Bali, together with Haut Chandni, formed part of the roperties sold, contended that Haut Chandni was a *debuttur* proerty which he held in trust as Shebait, and that Chutraput Singh ad been put in possession of the village of Bali only and not of e Haut Chandni. The Magistrate visited the scene of dispute, d after examining the witnesses and taking evidence adduced by

(1) MORRIS and PRINSEP, *J.J.*

1879

In re CHUTRAPUT SINGH.

Judgment.

either side came to the conclusion that the preponderance o proof of possession was in favour of Girindro Chunder Roy and gave an award declaring Girindro Chunder Roy entitle to retain possession of the haut until ousted by due course o law. In his judgment, the Magistrate gives at length hi reasons for this conclusion. He sets aside at the outset all con siderations arising out of the action of the Civil Court in giving possession of the haut to Chutraput Singh, and treats the case a though it were an ordinary dispute for possession of land betwee two rival zemindars. He says: "I warned either side at the out set that I should pay no attention to any evidence as to the righ to possession, and the warning has been fairly attended to The question as to whether the bazar is *debutter* or *mal*, and whether it is the 'Haut Chandi' mentioned in the deed of mort gage in foreclosure of which the village was sold has been touche lightly by either side. A finding in favor of the 2nd party on th question would not help him in these proceedings unless I coul follow it with another finding that the Nazir gave him symbolic possession of the bazar with the rest of the village when h planted a bamboo there some time in Choit, and a finding again i his favor on this point would be in no way conclusive unless, sinc the date of *bans-garee* and up to the date of institution of the proceedings, he has been in actual possession of a share in th bazar and in actual receipt of the rents and perquisites ther from. As a matter of fact no real evidence has been offered to the nature of the property, and the evidence that has been o fered as to the Nazir's proceedings, I may pass over to get at th real point in issue—the proceedings of the two rival represen tives in the bazar since the Nazir's visit."

It is in consequence of this disregard by the Magistrate the action of the Civil Court, as proved by the evidence of Nazir, that the petitioner Chutraput Singh seeks the inter ence of this Court under section 297.

It seems to us that there is much force in his contention, that the Magistrate is not competent, under section 530, to m fy the action of the Civil Court. He was bound to sa himself whether, in delivering possession, the Civil Court di did not give possession of the land on which the market is

If it did give such possession, and the possession was not subsequently abandoned, the action of the judgment-debtor in refusing obedience to its order is not enjoyment of the possession such as the Magistrate is to uphold. The question may hereafter arise, whether possession was wrongly given of this particular land, but if it was given, and the party to whom it was given has not subsequently withdrawn from it, and let another come in and establish himself thereon in such a manner that he can set up a peaceful enjoyment, the Magistrate is bound to maintain the order of the Court.

Now that the Nazir did in obedience to the order of the Court put Chutraput Singh in possession of the haut in dispute as well as of the village of Bali, is proved by his own evidence. He says: "I gave possession by planting a bamboo and beating a drum. There are 267 villages in Muhammad Amurpore. I went through the usual form in every village. I began in Choit and it took me thirty-one days. I gave possession of Joyram Sircar who was empowered to give receipt. The receipt was in the terms of this authenticated copy produced. The receipt contained the words "Bali mai haut." I got out of my boat at the ghat and went from there to the thannah over the bazar, declaring that possession of Girindro Chunder Roy's share had been given to Chattro Singh. I planted a bamboo about two bighas from the thannah near a dispensary. *I mentioned the haut in my proclamation*, and had a drum beaten. Joyram Sircar and Saradhar Ganguli and some others were there present."

Speaking also of the list of villages which he took with him and according to which he gave Chutraput Singh possession, he says: "I remember that in that list 'Bali mai haut' Chandni was written." As has already been mentioned, Girindro Chunder Roy did not in his written statement deny the allegation of Chutraput Singh that "Bali mai haut Chandni" was entered in the list of properties which the Civil Court sold to Chutraput Singh. As judgment-debtor, Girindro Chunder Roy must have been fully aware of this, and therefore it does not lie in his mouth now to say that the haut was not given with the village of Bali by the Nazir into the possession of Chutraput Singh.

1879

In re CHUTRAPUT SINGH.

Judgment.

From the evidence and from the Magistrate's own finding it clear that Chutraput Singh has never withdrawn from th possession given him by the Nazir. He has in spite of th opposition of Girindro Chunder Roy sought to maintain h possession by the exaction of the haut dues, and that Girindr Chunder Roy, the long-established proprietor, should be in a pos tion to give the better evidence of holding possession of the ha is not to be wondered at. But we are of opinion that when th Magistrate found that the Nazir, acting upon the authority of th Civil Court, had rightly or wrongly given possession of Bali m haut to Chutraput Singh, it was his duty to have maintained him i possession and not to have rendered the possession given by th Civil Court a nullity. The view expressed by Mr. Justice ELPHIN STONE JACKSON in the case of *Rai Mohun Roy* vs. *Wise*, in 16 W. I Cr. 24, meets with our entire concurrence. The sole object of Magistrate in taking action under section 530 is to prevent breach of the peace between rival claimants to a particular prope ty. For that purpose he satisfies himself as to the party actual in possession at the time that the proceedings were instituted, an declares such party entitled to retain possession until ousted b due course of law. In other words, he declares one party ent tled to retain possession until the Civil Court declares whic party has the better right and puts such party into possession.

Here the Nazir, acting under the authority of the Civil Cou had in due course of law put Chutraput Singh into possession the land in dispute, and yet in the view taken by the Magistra he cannot be allowed to retain the possession which the Na gave him, until a fresh order has emanated from the Civil Co and another Nazir has put him in possession. Such a course proceeding seems to us manifestly improper, as it defeats the ject for which section 530 was framed. We, therefore, m this rule absolute. We set aside the order of the Magistra and direct that Chutraput Singh be declared entitled to re possession of the haut, and that the Magistrate do see that is kept in possession of the same until he is ousted by due co of law.

[CRIMINAL REVISIONAL JURISDICTION.]

EMPRESS *vs.* HARI KISTO BISWAS.

1879
October 31*st.*

Criminal Procedure Code, sections 122 *and* 346—*Confession.*

A defect in a confession taken under section 122 of the Code of Criminal Procedure cannot be remedied, as in the case of an examination of a prisoner under section 346, by evidence taken at Sessions.

REFERENCE under section 263 of the Criminal Procedure Code by the Additional Sessions Judge of the 24-Pergunnahs.

In this case the accused was charged with having, on the 12th July last, murdered a boy of eight or nine years of age, whose body was found in a tank the following morning. The *post-mortem* examination showed that the death was caused by drowning, and on the same day, *i.e.*, on the 13th July, the accused made a full confession before the Cantonment Magistrate of Barrackpore, admitting that he had drowned the boy in order to possess himself of a golden armlet that he wore. No certificate was appended by the Magistrate to the effect that the confession had been voluntarily made. But the Sessions Judge found that there was reason to suppose that it was not a genuine and voluntary confession. He was of opinion, also, that it was corroborated at the trial by evidence showing—(1) that the deceased was last seen in the company of the accused on the afternoon of the day in question; and (2) that though short of funds previous to the occurrence, the accused had plenty of money that same evening. There was also other evidence showing that he was suspected from the first, and admitted his guilt before the police were sent for.

The Jury acquitted the prisoner. They considered that they could not be justified in convicting the accused in the absence of direct evidence of eye-witnesses to the murder; they declined to act on the prisoner's own confession, though they could assign no reason for disbelieving it; they found it proved that the deceased was in the prisoner's company on the day of the occur-

1879

EMPRESS v. HARI KISTO BISWAS.

Judgment.

rence, and that the prisoner in some manner, not satisfactorily explained by him, became possessed of money that day.

The Sessions Judge disagreed with the verdict of the Jury being of opinion, that the confession was amply corroborated be evidence. He, accordingly, submitted the case for the consideration and orders of the High Court.

The judgment of the Court (1), which was as follows, was delivered by

WILSON, *J.* WILSON, *J.* :—

We agree with the verdict of the Jury, and a judgment of acquittal must be entered. The reason of our judgment is this:—The confession which was admitted in evidence against the prisoner is clearly a confession taken under section 122 of the Code of Criminal Procedure, and not an examination of the prisoner by the committing Magistrate. As such, therefore, any defect in that confession cannot be remedied by evidence taken at the Sessions, as can be done in the case of an examination of the prisoner under section 346. Then on examination of this confession it appears that it does not bear the certificate of the Magistrate required by section 122, and without such certificate it cannot be received as evidence. Without this confession it is clear there is no sufficient evidence to justify the conviction. The prisoner will therefore be discharged.

(1) WILSON and TOTTENHAM, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

ESH LAL AND ANOTHER (PLAINTIFFS) . . APPELLANTS ;

AND

O GOLAM SINGH AND OTHERS (DEFENDANTS) . . . . . RESPONDENTS.

1879
Sept. 5th.

No. 1739 of 1878.

mitation Act (XV. of 1877), Schedule II., Art. 85—Mutual Accounts.

A mutual, open and current account, which was kept according to ie Sumbut year, having been adjusted in Assin Sudi 1931 S., corre-onding with October 25th, 1874, the date of the last admitted item, suit was subsequently, on the 6th December 1877, filed for the balance ue upon such adjustment.

Held that, even assuming that on the date of adjustment the account ased to be mutual, open and current, Art. 85 of Schedule II. of the imitation Act (XV. of 1877) was applicable, and that accordingly nitation ran from the close of the year 1931S., *i.e.*, the 20th April 75.

EAL from a decision of the Judge of Zillah Shahabad, ing a decree of the Moonsiff of Arrah.

plaintiff who are bankers in the suit, sued to recover 96 principal and interest due on an adjustment of accounts. alleged that there had been mutual dealings between them- and the defendants, who had a ferry under lease from ment; that the defendants used to pay their daily ts into the plaintiff's bank, drawing what money they d as occasion required. This arrangement ceased in 1874, adjustment of accounts took place on the 15th Assin 931, corresponding with the 25th October of that year, balance of over Rs. 600 was found to be due from the nts.

accounts were kept according to the Sumbut style of g. The plaint was filed on the 6th December 1877. The imitation was set up by the defendants.

urt of First Instance held that Art. 85 of Schedule II. V. of 1877, was applicable to the case, and consequently

1879

GONESH LALL v. SHEO GOLAM SINGH.

Judgment.

that the suit was not barred, and gave a decree for the amou claimed. The lower Appellate Court, however, disagreed with th holding, being of opinion that from the 25th October 1874, t account ceased to be mutual, open and current. It, therefor held that Art. 85 did not apply, but that Art. 57 was applicab to the case, and that the suit was, therefore, barred.

The plaintiffs, thereupon, preferred this second appeal.

Moonshee *Mahomed Yusuff*, for the Appellants.

Baboo *Sreenath Banerjee*, and Baboo *Chunder Madhub Ghose* for the Respondents.

The judgment of the High Court (1) was as follows :—

We think that upon the facts found by the District Judge that the account ceased to be mutual, open and current from the 25th October 1874, his decision dismissing the suit as barred by limitation is erroneous. He thinks that Art. 85 does not apply, but that Art. 57 does. We have not been able to understand the process of reasoning by which he came to this conclusion. His own finding shows that Art. 85 is applicable, and accepting that the account ceased to be mutual, open and current from the 25th October 1874, corresponding with Assin Sudi 15th, 1931 Sumbut, the present suit is within time. A suit of the nature described in Art. 85 (and this is a suit of that description according to the finding of the lower Appellate Court) may be brought within three years from " the close of the year in which the last item admitted as proved is entered in the account ; such year to be computed as in the account;" the account has been kept according to the Sumbut year, and the last admitted item is dated the 25th October 1874, corresponding with Assin Sudi 15th, 1931. The year 1931 Sumbut closed on the 20th April 1875, and the present suit was brought on the 6th December 1877, *i.e.*, within three years from the close of the Sumbut year 1931.

We, therefore, set aside the decision of the lower Appellate Court dismissing the suit as barred by limitation, and remand it for retrial to that Court. Costs to abide the result.

(1) MITTER and TOTTENHAM, *J.J.*

[PRIVY COUNCIL.]

KISHEN DUTT RAJAH . . . . . 1879 *March 20th.*

AND

MUMTAZ ALI KHAN . . . . . .

Mortgage—Mortgagee in possession, Effect of purchase of Birt tenures by—Birt tenures—Redemption—Encumbrances, Purchase of, by mortgagee.

An Oudh taluqdar, who had mortgaged a portion of his taluq to the defendant, under a deed transferring the whole taluqdari interest in such portion until redemption to the mortgagee, is entitled in a suit for redemption, on re-payment of the mortgage loan, not only to redeem the superior rights of taluqdar which he was possessed of at the time of the execution of the mortgage, but also to be put into possession of subordinate rights and tenures purchased and treated as merged, by the mortgagee while in possession from *birtias*, or inferior zemindars, holding under the taluqdar within the mortgaged portion of the taluq.

The nature of *birt* tenures discussed.

THIS was an appeal from a decision of the Judicial Commissioner of Oudh.

Doyne, for the Appellant.
Graham, for the Respondent.

The facts are fully set forth in the following judgment of the Judicial Committee (1) of the Privy Council :—

The facts of this case, though some of them were originally contested, are now hardly in dispute, and may be shortly stated. On the 22nd of May 1846 Raja Umrao Ali Khan, described as zemindar of Ilaka Utraoli (the father of the respondent), executed in favor of Pande Ramdutt Ram (who is now represented by his brother, the appellant) the instrument of mortgage which is at p. 2 of the record. The nature of the interest so mortgaged, or intended to be mortgaged, will be afterwards considered. At present it is sufficient to state that the deed purported to be a usufructuary mortgage of the villages specified in

(1) Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

1879

KISHEN DUTT RAJAH v. MUMTAZ ALI KHAN.

Judgment.

the schedule to it, redeemable on the repayment, at a certain season of the year of Rs. 36,000, the principal sum secured, the mortgagee entering into possession, and taking, until redemption, the rents and profits of the mortgaged property, in lieu of interest. Of those villages, two, viz. Panipur and Mubarakpur, have in some way ceased to belong to the estate; the others have, at p. 129 of the record, been conveniently divided into seven separate classes or groups.

Immediately after the execution of the deed, the mortgagee attempted to enter into the actual receipt of the collections from the lands comprised in the mortgage, but was encountered by the opposition of a number of persons, who claimed to hold all or most of those villages under various birt tenures, the effect of which was to make each of them the zemindar of the villages comprised in his tenure, rendering only some small dues and payments to the Raja Utraoli. The resistance of the birtias seems to have been in a great measure successful; and it must now be taken to have been found in the suit that the birts were valid and subsisting sub-tenures at the date of the mortgage; and that the rights of the birtias in the different villages comprised in the 1st, 3rd, 4th, and 6th of the seven classes or groups above referred to, were purchased by the mortgagee some time in or before the year 1849. The birt right (if any) in the villages comprised in the remaining three groups remained in the original birtias or their representatives. Thus stood the rights of the parties at the time of the annexation of Oudh.

At the summary settlement, posterior to Lord Canning's proclamation, the mortgagee appears to have been allowed to engage for all the villages contained in the seven groups, and thenceforward to have held them as a taluq, subject, of course, to the right of any subordinate zemindar, or other sub-tenant, to a sub-settlement.

In December 1870, and in the course of the regular settlement of the province, the respondent, as the son and representative of the original mortgagor, asserted by the present proceedings his right to redeem. That right, though at first disputed, is now admitted, and the only questions that remain open between the parties are, what are the nature and extent of

able interest, and on what terms is the right of redemp-
be exercised. These questions have received three differ-
tions in the course of the voluminous proceedings that
en had in the cause.

ain Forbes, the settlement officer, in his proceedings of November 1873, found that, at the time the mortgage s executed, the mortgagor's right and interest in the r mortgaged was limited to the annual levy of a village ed "Cheut," and of certain market dues, to the occasional a cess known as "Sharakatana," and to a reversionary all lapsed birt estates, the title in which had been de-om the mortgagor's family; that the taxes thus levied the nature of feudal or manorial tributes, and though rily fluctuating in amount, may be held to be represented n equivalent, as nearly as possible, on an average to 10 . of the rental taken as the standard for assessment of ernment demand, and that the right and interest thus was all that the Raja of Utraoli was competent to con- all that was conveyed under the mortgage deed.

proceeding being under a remand, Captain Forbes was mpetent to determine the case judicially; but from the nding, it may be inferred that, in his opinion, all that tgagor was entitled to redeem was the superior title as escribed, subject to the birt interests whether vested in tgagee or others.

Commissioner, by his final judgment of the 20th of June cided that what was conveyed by the mortgage, and was leemable by the mortgagor, was, as between him and the ee, the full and unrestricted proprietary title in the overed by the deed of mortgage. He treated the acqui- the birts by the mortgagee as made on behalf of the or, and apparently proposed to allow the former nothing t he had expended on such acquisitions.

dgment was on appeal varied by the Judicial Commis- hose order of the 9th of February 1875, was in the terms:—

t of redeeming the mortgage on the estate of Itwa ted in 1253 Fusli, by Umrao Ali Khan, ancestor of

1879

KISHEN DUTT RAJAH v. MUMTAZ ALI KHAN.

Judgment.

plaintiff in favor of defendant, is decreed in favor of plaintiff on payment of Rs. 36,000, and if the plaintiff at the time of redemption pays to defendant the further sum of Rs. 3,139, he will be entitled to re-enter on the estate with all the rights and privileges now enjoyed by the defendant, but if he fails to pay the further sum of Rs. 3,139 at the time of redeeming the mortgage, defendant will be entitled to retain the rights and interests of the birtia zemindars purchased by him in the estates of Khera Dili, Bankata Ganeshpur, Sanapur and Itwa, and will retain these rights as an absolute under-proprietary tenure in subordination to plaintiff, paying to the plaintiff a rent equivalent to the Government demand for the time being, with an addition of 10 per cent.

Against this order the present appeal is preferred. There is no cross appeal, and therefore the contention between the parties is narrowed to this :—Can the mortgagor, upon paying the purchase money of the birts, plus the original mortgage money, redeem the estate as it is now enjoyed by the mortgagee? Or is the latter entitled in any case to retain the rights and interests of the birta zemindars, purchased by him as an absolute under-proprietary tenure, in subordination to the taluqdar, and to have a subsettlement on that basis?

The issue thus evolved from this lengthy litigation is a narrow, but a nice and somewhat difficult one.

The appellant originally insisted that what was mortgaged was the mere right to receive a malikanah allowance; and he still insists that the mortgage must be taken to have been made subject to the birts; that those birts, though held in some sense under the Rajah of Utraoli, were distinct estates; that the plaintiff is not entitled to redeem more than his ancestor mortgaged; and that the appellant or his brother was, notwithstanding the relation of mortgagor and mortgagee, entitled to purchase, and must be deemed to have purchased, the birts bought by him in his own right, and for his own benefit.

Their Lordships are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure, existing at the date of the mortgage, must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of

1879

KISHEN DUTT RAJAH v. MUMTAZ ALI KHAN.

Judgment.

ged property, and make the whole, including the sub-ten-
bject to the right of redemption upon equitable terms.
ay well be that when the estate mortgaged is a zemindary
er Bengal, out of which a putnee tenure has been granted,
within the ambit of which there is an ancient mocurraree
ree tenure, a mortgagee of the zemindaree, though in pos-
might purchase with his own funds and keep alive for his
nefit that putnee or mocurraree. In such cases the mort-
an hardly be said to have derived from his mortgagor any
means or facilities for making the purchase which would
possessed by a stranger, and may therefore be held enti-
ually with a stranger, to make it for his own benefit. In
ses also the putnee, if the putneedar failed to fulfil his
ons, would not be resumable by the zemindar, and the
ry would always have been held subject to the mocurraree.
Lordships, nevertheless, have come to the conclusion,
not without some doubt and difficulty, that the decision of
licial Commissioner was, in the peculiar circumstances of
e, correct, and ought to be affirmed.

irst point to be considered is, what is the true construc-
the original contract, and what were the intentions and
anding of the parties to it? The deed was not in terms
bject to recognized birts, for it contains no reference to
On the face of it, it is a mortgage of the ilaka or ilakas,
ng of the 35 villages, one piece of land, and one jote,
ing all the internal and external rights, which had de-
to the mortgagor from his ancestor." And it is expressed
on the following conditions, viz.:—"That the said Pande
d to take possession of the said villages and enter into
ent with the Government for the payment of revenue.
ortgagor) shall have nothing to do with the profits of the
r to stop the injuries which may be done to it. I shall
d to redeem the estate, when I pay the said sum (the
00) in one lump to the Pande in the month of Baisakh,
e are no crops standing on the ground." "If any one
ay claim to the said estate, it will be my duty to de-
it, with which the Pande shall have nothing to do."
lation obviously points to a possible claim by title

1879

KISHEN DUTT RAJAH v. MUMTAZ ALI KHAN.

Judgment.

paramount to the whole zemindary, and is in the nature of a covenant for title. The other stipulations plainly indicate that the mortgagee, until redemption, was to be the zemindar *de facto* of the estate, with all the rights, privileges and powers of a zemindar, as between him and the sub-tenants; that he was to take the profits of it, and defend it against the injuries done to it; and further, that it was in the contemplation of both parties that he might take possession of the villages and receive the collections from them. This construction is consistent with the decisions of all the Courts that have dealt with the case. All have negatived the original contention of the defendant that the plaintiff had no other right than that of redeeming a malikanah allowance, and have held that the subject of the mortgage was the taluqdari interest, with all its incidents, whatever that might include.

The next point to be considered is, what was the nature of the birt tenure, and what the relations between the birtias and the superior zemindars? Upon this point their Lordships were referred by Mr Doyne to the settlement circular of the 29th of January 1861, being an official paper issued by the then Chief Commissioner of Oudh by way of instructions relative to the regular settlement of the province then about to be made.

The material paragraphs of the paper are the 18th to the 25th both inclusive.

The 18th paragraph says:—That birts were given for whole mouzahs, or patches of lands in mouzahs, and proposes in the first instance to deal with the latter. The 19th paragraph says:—These tenures, when granted by the taluqdar for money received, will be maintained as representing the proprietary rights of the birtias, who by purchase, have acquired the position of intermediate holders, and as constituting the portion of profits left them by the taluqdar; and then, after distinguishing between birts given by taluqdars and those given by mere thekadars, and treating the latter as not entitled to be maintained, it says, birts given by the original "zemindars before the village was incorporated in the talu[q]qa will be upheld unless the taluqdar resumed them prior to 18[5]63." The 21st paragraph says:—Birts of entire mouzahs are [u]common in Gondah and Gorakpore; they originated in pur[e]

n needy taluqdars, and sometimes in clearing leases of jungle . In the Utraoli and Batni Pergunnahs of the Gondah icts the birtias had been in many instances admitted to direct gements with the Native Government for years previous ıe annexation, and of course were settled with, and should been so at the late summary settlement, on the princi- hat we are not bound to restore to the taluqdars what had lost before our rule commenced." The 22nd paragraph :—"In other instances the birtias held under the taluq- on the terms of their birt pottahs. These generally were, 10 per cent., or dyhak as it was called, on the amount of the hs, should be returned to them; that while they held on pottahs, the entire control of the village rested with them; if they threw them up rather than accept enhanced terms, were entitled to 10 per cent. on the collections. Sometimes ıirtias' proprietary profits were shown in holding a portion e area nankar." The 23rd paragraph says :—"In other in- es the birtias had been stripped of every vestige of proprie- right, for embarrassed taluqdars would sell the birt of a ;e several times over, and nothing was more common than e several claimants to the birt of a village, each with his h in correct form." Paragraph 24 says :—"When the birtia lost possession, there is no more to be sold. We are not to re it to him, but the Chief Commissioner is clearly of opinion the birtias, who were found in direct engagement with the at the time of annexation, or who have uninterruptedly held ı villages on the terms of their pottahs under the taluqdars, be maintained in the full enjoyment of their rights in sub- ıation to the taluqdars. It is no argument that the taluqdar not realize more than 10 per cent. above the Government nd. Such birt tenures must be considered an intermediate st between the taluqdar and the ryot, and, as such, entitled maintained." The 25th paragraph says :—"The meaning of n 'birt' is a 'cession.' It is the purchase of the proprietary subordinate to the taluqdars on certain conditions as to of rent, which were held to be binding, though undoubt- n violated by superior power. In Gorakpore the birtias rally admitted to direct engagements, though charged

1879

KISHEN DUTT RAJAH v. MUMTAZ ALI KHAN.

Judgment.

with a malikana of 20 per cent. to the taluqdar. Here he must deal with the superior party."

The result of what has been cited seems to be that, under the *nuwabi*, these birt tenures were presumably carved out of the taluqdar's or superior zemindar's estate; that they were held under him upon terms varying according to the terms of the particular pottah or contract, and possibly according to the custom of a particular district; that they did not necessarily entitle the holders of them to engage directly with the Government for the revenue; that when such direct engagements took place malikana was payable to the taluqdar, that they were sometimes resumable, and when resumed would fall into the parent estate; and that in all cases the relation of superior lord and tenant subsisted between the zemindar and the birtias—a relation which in an unsettled state of society, like that of Oudh, under the Nawabi, would probably involve more or less of power in the former over the latter, and in dealings between them give the zemindar advantages which would not be possessed by a stranger. On the other hand it is clear that birts still subsisting are tenures which would entitle their holders to sub-settlement under "The Oudh Sub-Settlement Act of 1866."

The question, however, remains, what was the effect as between the mortgagor and the mortgagee of the purchases by the latter of the birts in question? To determine this, it is desirable to consider, somewhat more in detail, what has been his course of action.

Upon the evidence in the cause it would seem that in or after the year 1254 F. (probably the first settlement after the execution of the mortgage), the mortgagee was permitted to engage for the whole estate, although some at least of the birtias had in former years, been allowed to engage, for the particular villages comprised in their tenures directly with the Government, and that he continued so to do up to the time of annexation. The first summary settlement after that event was, however, in accordance with the policy that then prevailed, have been made with some at least of the birtias, including those of Itwa, who are now said to have previously parted with all their birt interests.

1879

KISHEN DUTT RAJAH v. MUMTAZ ALI KHAN.

Judgment.

It has also been proved that, immediately after the execution of the mortgage, the mortgagee attemped to enter into the direct receipt of the collections of all the villages by force of his taluqdari title, and was only prevented from doing so by the resistance of the birtias, and the interposition, with or without jurisdiction, of the officer called the nazim. Here, then, the taluqdar, *de facto*, was in open conflict with tenants of the state claiming to be birtias. There is no proof of any regular trial and determination by a Civil Court of the disputed right. The *nazim* may have taken action merely as a matter of police, and to prevent disturbance. Then follow the purchases in 1256 F. and 1267 F., and the execution of the deeds by virtue of which the birtias, for very inconsiderable sums, conveyed their interests in the lands in question nominally to Pande Ramdutt Ram. There is, however, no evidence of the negotiations which led to these contracts; nothing which shows upon what basis they proceeded; how far in making the purchases, the Pande was acting in the character, and using the powers of talukdar, or how far in doing so he was compromising alleged rights which might otherwise have been successively asserted for the benefit of the estate. The apparent inadequacy of the consideration money affords a strong argument for supposing that the transactions may have been in the nature of compromises, which the powers of talukdar were exerted to effect on favorable terms.

Again, what followed on the purchases? Had they been made by or on behalf of a talukdar holding under an absolute, as distinguished from a mortgage title, the tenures would, as a matter of course, have merged in the taluk. The mortgagee seems, until the institution of these proceedings, to have treated them as so merged. He is not shown to have taken any steps to keep them alive, as distinct sub-tenures, for his own benefit. On the contrary, at the time of the first summary settlement after annexation, he never sought to engage for these villages as birtia, and in the summary settlement after Lord Canning's proclamation he did, in fact, engage for them as talukdar, and as parcel of the taluk. His conduct is not surprising. He probably did not contemplate redemption (in this very suit he disputed the right to redeem,) and he, therefore, not unnaturally dealt with the birts

1879

KISHEN DUTT RAJAH v. MUMTAZ ALI KHAN.

Judgment.

as merged in the taluk, thereby enhancing the value of the mortgaged estate, of which he expected to become absolute proprietor.

Again, had the mortgagor redeemed before these purchases he would have resumed his position as talukdar, with the means of dealing on favorable terms with birtias, who have proved to have been willing to part with their interests for very inconsiderable sums. The mortgagee, taking advantage of his position of talukdar *de facto*, has so acquired the birts, and allowed them to merge in the taluka. To allow him now to revive these birts for his own benefit, with the certainty of tenure and increased value which the regular settlement will give them, would obviously alter the position of the mortgagor for the worse, by reducing the redeemable estate *pro tanto* to a mere right to malikana, and possibly rendering the taluka no longer worth redemption.

Their Lordships are, therefore, of opinion that the Judicial Commissioner had strong grounds for applying the principle, which he explains by his subsequent minutes of the 26th of January, and the 9th of February 1875, he intended to affirm in his order of remand of the 26th of March 1873. In his final judgment he says that his intention in sending the case back to the Commissioner's Court was to ascertain whether the defendant could prove that he had increased the value of the estate by buying up certain incumbrances; and, if so, whether he had any claim on the plaintiff in respect of his expenditure on this account.

There was some discussion at the Bar on the English decisions upon similar questions between mortgagor and mortgagee. If the principle invoked depended upon any technical rule of English law, it would, of course, be inapplicable to a case determinable like this, on the broad principles of equity and good conscience. It is only applicable because it is agreeable to general equity and good conscience. And, again, if it possesses the character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions, although those decisions are undoubtedly valuable, in so far as they recognize the general enquiry of the principle, and show how it has been applied by the Courts of this country. It is, therefore, desirable

1879

KISHEN DUTT RAJAH v. MUMTAZ ALI KHAN.

Judgment.

ortly to notice the arguments on this point. It seems to ir Lordships that, although some of the earlier cases may e been qualified by more recent decisions, the general iciple is still recognized by the English law to this nt, viz., that most acquisitions by a mortgagor enure for benefit of the mortgagee, increasing thereby the value of security: and that, on the other hand, many acquisitions he mortgagee are in like manner treated as accretions to mortgaged property or substitutions for it, and therefore ect to redemption. The law laid down in *Rakestraw* vs. *wer*, 2 P. W., 510, as to the renewal of a term obtained by mortgagee of the expired term, being, "as coming from the e root," subject to the same equity, has never been impeached. English case, which in its circumstances comes nearest to ent, is that of *Doe* vs. *Pott*, 2 Doug., 709, in which principle was enforced against a mortgagor. It was there that if the lord of a manor mortgage it in fee, and wards, pending the security, purchase and take surrenders imself in fee of copyholds held of the manor, they shall e to the mortgagee's benefit, and the lord cannot lessen the rity by alienating them. It is difficult to see why, as in the of a renewable lease, the same equity should not attach to the tgagee, particularly if by reason of his position as mortgagee ossession he has had peculiar facilities for obtaining the sur- ers. Some stress was laid upon the case of *Shaw* vs. *ay*, 33 Beav. 494, in which Lord ROMILLY, M. R., held that a nd mortgagee was entitled equally with a stranger to purchase is own benefit the mortgaged estate when sold under a r of sale contained in the first mortgage. An opinion to ame effect had previously been expressed by Vice-Chancellor lersley, in *Parkinson* vs. *Hanbury*, 2 DeG. J. and S. 474, gh he decided that case against the second mortgagee on round of his having had actual notice of an irregularity sale. These authorities, however, do not seem to their ips to touch the present case. The effect of sale under r of sale is to destroy the equity of redemption in the d to constitute the mortgagee exercising the power a of the surplus proceeds, after satisfying his own charge

1879

KISHEN DUTT RAJAH v. MUMTAZ ALI KHAN.

Judgment.

first for the subsequent incumbrances and ultimately for the mortgagor. The estate, if purchased by a stranger, passes into his hand free from all the incumbrances. There seems to be no reason why the second mortgagee, who might certainly have bought the equity of redemption from the mortgagor, should not, equally with a stranger, purchase the estate when sold under a power of sale created by the mortgagor. Upon the whole, then, their Lordships are of opinion that the decision of the Judicial Commissioner is equitable and correct, and they will humbly advise Her Majesty to affirm it and to dismiss this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

Sept. 15th.

No. 1259 of 1878.

GUNGA PERSHAD AND OTHERS (PLAINTIFFS) . APPELLANTS;

AND

SHEODYAL SINGH AND OTHERS (DEFENDANTS). RESPONDENTS.

Mitakshara Joint Estate—Alienations by father of joint family—Aliens, Rights of.

An alienation of joint family property made by a father under the Mitakshara law, for the purpose of paying off an antecedent debt, is binding upon the sons, unless they show that the debt was contracted for immoral purposes.

The case of *Bheknarain Singh* vs. *Januk Singh*, I. L. R., 2 Cal., 438, being opposed to the decision of the Privy Council in the case of *Gridhari Lall* vs. *Kantoo Lall*, L. R. 1 I. A., 321, as explained by that of *Ram Sahai* vs. *Sheo Prosad Singh*, 4 C. L. R., 226, and L. R. 6 I. A., cannot now be followed.

APPEAL from a decision of the Judge of Gya, modifying the decree of the Subordinate Judge of that district.

Mr. *C. Gregory*, and Baboo *Jodonath Sahoy*, for the Appellants.

Moonshee *Mahomed Yusoof*, for the Respondents.

The facts are fully stated in the judgment of the Court (1), which was as follows :—

The facts of this case are briefly as follows :—The defendant Sheodyal Singh executed in favor of the plaintiffs a surpeshgi

(1) MITTER and TOTTENHAM, *J.J.*

1879

GUNGA PERSHAD v. SHEODYAL SINGH.

Judgment.

pottah of the lands in suit on receipt of a loan of Rs. 4,200. In contravention of the terms of the pottah Sheodyal dispossessed the plaintiffs from the lands in suit. Thereupon the plaintiffs brought this suit against Sheodyal alone, praying alternately either for the recovery of the lands covered by the pottah, or for the realisation of the zurpeshgee money by the sale of these lands.

Sheodyal did not enter appearance in the lower Courts, but his sons defended the suit, on the ground that the property in dispute being ancestral property, and there having been no legal necessity for the loan contracted under the zurpeshgee lease, the instrument in question is not binding upon them.

The Subordinate Judge of Gya, who tried this case in the first instance, found that Sheodyal borrowed the money from the plaintiffs in order to pay off other creditors. The sons being liable to pay all the debts of the father under the Mitakshara law, with the exception of such as were contracted for immoral purposes, and there being no evidence to show that the loan in question was contracted for immoral purposes, he was of opinion that, under the authority of the Privy Council decision *Gridhari Lall* vs. *Kantoo Lall*, the zurpeshgee pottah was binding upon the sons of Sheodyal Singh. But under the circumstances of the case, he was of opinion that the plaintiffs were entitled to a decree for the zurpeshgee money. He, accordingly, decreed the claim for money, directing the decree to be executed, first against the property and person of Sheodyal, and the balance, if any, to be realized by the sale of the property of Sheodyal's sons.

Against this decree both the sons of Sheodyal and the plaintiffs appealed; the former claiming to be wholly exonerated, and the latter claiming a decree for possession. The District Judge, on the appeal of the sons, being of opinion that the authority cited by the lower Court was not applicable, but that the case was governed by a decision of this Court reported in I. L. R., 2 Cal., 438, *Narain Singh* vs. *Januk Singh*, and being further of opinion that the evidence adduced by the plaintiffs did not establish any legal necessity for the loan, has wholly absolved the sons of Sheodyal from the claim. On the plaintiff's appeal he has varied the

1879

GUNGA PERSHAD v. SHEODYAL SINGH.

Judgment.

decree of the Subordinate Judge against Sheodyal by awarding possession of his share in the lands in suit.

The plaintiffs have preferred this second appeal, and contend that they are entitled to a decree for possession of the whole share leased against the father and the sons.

The decision of the Judge is fully supported by the authority cited by him—*Bheknarain Singh* vs. *Januk Singh*, I. L. R., 2 Cal., 438. But this case, it seems to us, cannot now be followed, because it is opposed to the Privy Council decision in *Gridhari Lall* vs. *Kantoo Lall*, L. R. 1 I. A., 321, as explained by their Lordships of the Judicial Committee in a very recent case—*Ram Sahai* vs. *Sheo Prosad Singh*, 4 C. L. R., 226, and L. R. 6 I. A. This last-mentioned case has now clearly laid it down that an alienation by a Mitakshara father of a joint family property to pay off an antecedent debt is valid against the sons, unless they show that the debt was contracted for immoral purposes. This being the state of the law as settled by the recent Privy Council decision, and the sons in this case not having shown that the zurpeshgee loan was taken for immoral purposes, the zurpeshgee pottah is binding upon them. Reversing the decrees of the Courts below, we therefore decree the possession of the lands in suit with costs in all the Courts.

[CIVIL APPELLATE JURISDICTION.]

RAM AWTAR SINGH (PLAINTIFF) . . . . APPELLANT ; 1879 *Sept.* 11*th*.

AND

TULSI RAM (DEFENDANT) . . . . . RESPONDENT. No. 2253 of 1878.

Mortgage—Resumption by Government of portion of lands mortgaged, and subsequent sale to mortgagor—Equity—Waiver.

Government having, under the Land Acquisition Act, taken possession of portion of certain land which had been mortgaged by the owner, subsequently, while the mortgage was still in force, resold the portion taken, to the mortgagor, who sold it to a third person *bonâ fide* for value.

In a suit by the mortgagee, (who had taken no steps to obtain any portion of the money paid by the Government for the land,) praying for the sale under the mortgage of the land resumed by Government, *held*, that the plaintiff as mortgagee had waived his rights under the mortgage, and that the purchaser from the mortgagor had acquired a title free from the plaintiff's incumbrance.

Quære:—Whether the mortgage claim might not, but for the waiver, have re-attached, on the lands resumed by the Government again coming into the possession of the mortgagor.

APPEAL from a decision passed by the Judge of Shahabad, affirming the decree of the First Moonsiff of Arrah, dated the 4th March 1878.

Baboo *Mohesh Chunder Chowdhry*, for the Appellant.

Moonshee *Mahomed Yoosoof*, for the Respondent.

The facts are sufficiently set forth in the following judgment of the High Court (1) :—

In this case the defendant No. 3 Sheru Mian executed a mortgage bond in favor of the plaintiff, hypothecating 49 beegahs of land as security for Rs. 700 advanced by the plaintiff. Subsequently to the execution of that mortgage deed, in the year 1875 the Government gave all proper notices for the purpose of acquiring 5 beegahs out of the 49 beegahs

(1) PONTIFEX and MCDONELL, *J.J.*

1879

RAM AWTAR SINGH v. TULSI RAM.

Judgment.

of land for public purposes. The Collector took possession under section 16 of the Land Acquisition Act, and thereupon the 5 beegahs vested absolutely in the Government free from all encumbrances. There is no suggestion in this case that the mortgagee, the plaintiff, did not receive full notice of the acquisition by Government of this land. It appears, however, that he took no steps to receive any part of the money paid by Government for the land; and all the money that had been paid by Government was either received by Sheru Mian, the mortgagor, or was taken from the Collectorate by his execution creditors. After the property had been in the possession of Government about two years, and had been used by them for the purpose of a model farm, it appeared that the farm was not a paying concern; the Government determined therefore to rid themselves of the land; and accordingly they offered the land to the original owner Sheru Mian, who paid the Government a certain sum for it, and resumed possession, but no conveyance was executed by Government to him. Within a few days after his resuming possession, he sold these 5 beegahs of land to the first defendant, Tulsi Ram; and it appears from the judgment of the lower Appellate Court that a very large proportion of the money which Sheru Mian paid to the Government for the re-acquisition of these 5 beegahs was in fact advanced by Tulsi Ram. After the conveyance to Tulsi Ram, the plaintiff, the original mortgagee of the 49 beegahs, instituted a suit against Sheru Mian only, asking for the sale of the 5 beegahs under his mortgage bond; and he obtained a decree for the sale of those 5 beegahs. But in that suit the first defendant, Tulsi Ram, was not a party; and intervening in the execution proceedings, he obtained an order setting aside the decree for sale. Thereupon the plaintiff commenced this suit against Tulsi Ram, the purchaser, and Sheru Mian, the original mortgagor, and he claims in this suit that the 5 beegahs of land should be sold, and the proceeds applied towards the satisfaction of his mortgage-debt. His case has been argued before us upon three grounds: first of all it is urged that this case is similar to the case in L. R., 4 I. A., 15—*Narain Singh* v. [illegible] *Singh*, where a second mortgagee, after being out of possession

1879

RAM AWTAR SINGH v. TULSI RAM.

Judgment.

for more than twelve years, was held by the Privy Council to be entitled to sue the mortgagor, when he recovered possession of the mortgaged property. But that case is very different from the present. There the second mortgagee having obtained a decree for possession, and having been placed in possession, was subsequently turned out at the suit of the first mortgagee, and until the first mortgagee's debt was satisfied, it is clear the second mortgagee was not entitled to possession. When the first mortgagee's debt was satisfied in 1870, the mortgagor re-entered into possession, and shortly afterwards the second mortgagee took proceedings to recover possession. All that the Privy Council held was, that the second mortgagee was not barred by limitation from recovering possession against the mortgagor. We think, therefore, that the case has no application to the present.

The second ground on which the plaintiff relies before us is, that his case is similar to the cases contemplated by sections 18 and 19 of the Specific Relief Act (I of 1877), when a person misrepresenting himself to have a title contracts to sell land which he says he holds under that title and is bound, if he subsequently acquires a title, to make good the representation which he had formerly made. But in this case the mortgagor made no representation which he did not fulfil, and the mortgagee, if he had applied to the Collectorate for the purchase-monies paid by the Government, would have been entitled to receive them. His failure to apply was a waiver of his right to insist upon the 5 beegahs as part of the security for his mortgage-debt, and the 5 beegahs vested in the Government precisely in the same way as if the plaintiff had joined with the mortgagor in conveying them by deed, and the plaintiff had waived his right to any portion of the purchase-money. The principal ground upon which it has been attempted to put the case is, that whenever a mortgagor gets back into his possession a property which he had mortgaged to a third person, he is bound in equity to hold that property subject to the mortgage originally created by him. That, we apprehend, is very much the same equity as governed the case of *Otter* vs. *Vaux*, 2 Kay and Johnson, 650. The facts of that case were, that a first mortgagee by his power of sale which gave a good title to all the world as against a second mortgagee, sold to the mortgagor; and

1879

RAM AWTAR SINGH v. TULSI RAM.

Judgment.

there it was held that the mortgagor, acquiring the estate the power of sale, was not in a better position than if he ha off the first mortgagee, when, of course, the estate woul remained subject to the second mortgage. The equ which that case was decided was, that it was the duty mortgagor to pay off the first mortgagee, and so dischar estate for the benefit of the second mortgagee; and th purchasing from the first mortgagee, instead of paying h was a mere evasion of such duty. But in *Otter* vs. *Vau* point was raised, whether, supposing the first mortgagee, i of selling to the mortgagor, had sold to a third person would have held free from the second mortgage, and tha person had subsequently re-sold to the mortgagor, wou mortgagor then have held the property subject to the mortgage? And that is very much the case we have before in the hands of Government the land was certainly free fro plaintiff's claim. With respect to such a case the Vice-Ch lor said (and it was repeated in the Court of Appeal): "I enter into the difficulties that might arise in a case whe first mortgagee sold the estate under a power of sale, a property, after passing through six or seven different hand at last be purchased again by the mortgagor, because there not in that case be the circumstance that there is here, n the payment by the mortgagor into the hands of the first gagee, of the money which, by all the terms of his contra mortgagor was bound to pay to the first mortgagee in dis of the mortgage-debt." However, it is not necessary for this case to decide whether or not, if this property were the hands of the mortgagor, it would be affected by the cl the mortgagee; for it appears upon the facts of the case by the lower Court that after the Government had relinq possession of the property to the mortgagor, the mortgagor the first defendant, who is so far a *bonâ fide* purchaser that h the full value of the property to the mortgagor. We also fi the first defendant in his written statement raises the ca he is a *bonâ fide* purchaser for value. We think it wa open to him to insist that he need look no further back th purchase from Government by the mortgagor as his t

title. He might well have assumed that when the purchase had been made by Government, which acquired the estate free from all encumbrances, the former encumbrances had all been satisfied. Or he might have assumed, and he would be justified in assuming, that the mortgagee, having neglected to apply to Government for any part of the purchase-money of the 5 beegahs sold to Government, must be taken to have waived his rights and released those 5 beegahs from his mortgage claim. We think, therefore, that the title which Sheru Mian made to Tulsi Ram, after re-acquiring the property from Government, was a title free from the plaintiff's encumbrance. Under the circumstances, therefore, we must dismiss this appeal with costs. 1879

[CIVIL APPELLATE JURISDICTION.]

UBRAJ ROY AND OTHERS (PLAINTIFFS) . . APPELLANTS; *Sept. 9th.*

AND No. 150 of 1879.

. MACKENZIE AND OTHERS (DEFENDANTS) . RESPONDENTS.

Notice to quit—Ejectment suit.

A notice to quit within thirty days, served by a landlord on his tenant, at a time when the crops are ripening, is unreasonable and insufficient. Where such a notice was given, the Court refused to determine what would have been a sufficient notice, and to make a decree to take effect at a future date on the basis of such notice.

Per GARTH, *C.J.*—The cases of *Mahomed Rasid Khan Chowdhry* vs. *Jadoo Mirda*, 20 W. R., 401, and *Hem Chunder Ghose* vs. *Radha Pershad Palest*, 23 W. R., 440, considered and doubted.

EGULAR APPEAL from a decision passed by the Sub-ate Judge of Tirhoot.

e plaintiffs in this case sought to recover possession of in lands occupied by Mackenzie, the chief defendant. They d that he had purchased the lands in question as being the jote of one Hurronath Roy and others, while in fact these had no such jote; and that they had given him notice to uish possession.

1879

JUBRAJ ROY v. MACKENZIE.

Judgment.

The defendant Mackenzie urged, among other objections, that he was tenant of the lands in dispute with the consent of all the shareholders; that the notice to quit was improper; that the plaintiffs, as part proprietors only, had no power to give notice to quit without the consent of the other shareholders. He also claimed to have acquired a right of occupancy.

It appeared that the notice given by the plaintiffs had been served in Phalgun 1282 F. (corresponding with February 1875), at a time of the year when the crops were on the ground, and was to the effect that the defendants should give up possession within thirty days, otherwise a suit should be brought for damages and for ejectment.

This notice the Subordinate Judge considered to have been given at an improper time, and he refused to allow the suit to proceed on the basis of such notice. The suit was dismissed.

The plaintiffs appealed.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Hem Chunder Bannejree*, for the Appellants.

Baboo *Saroda Churn Mitter*, for the Respondents.

The following judgments were delivered by the Court (1):—

GARTH, *C.J.*

GARTH, *C.J.*:—

This is a suit brought by the plaintiffs, who claim to be the owners of a 6 annas and 2 gundas share in mouzah Bhugwanpore Deswa, and of a 10 annas share in Pertabpore Deswa, to put an end to the tenancy and right of cultivation of the defendant Mr. Mackenzie, in respect of 325 beegahs of land forming part of the property of which the plaintiffs claim to be co-sharers.

The plaintiffs say, that previously to the year 1858, Hurronath Roy and others, brought a suit, claiming a certain share in the above mouzahs, and in the Court of first instance obtained a decree. That decree, they say, was afterwards reversed on appeal, but upon the strength of it Hurronath Roy and others, in the year 1858, took possession of several plots of land in Mouzah [illegible]

(1) GARTH, *C.J.*, and PRINSEP, *J.*

wanpore and made a lease to the factory of Jetwarpore, (of which Mr. Mackenzie is now the manager and proprietor), of their shares in the mouzahs by a ticca pottah for seven years, dated the 31st January 1858.

The plaintiffs also say that the factory obtained another ticca pottah from the plaintiffs themselves of their shares in the mouzahs for seven years, dated the 22nd April 1858; and that the interest of Hurronath Roy and others, was afterwards sold by auction under a decree, and purchased by the factory who have been in possession of it since; that the plaintiffs themselves afterwards brought suits for rent due under their ticca pottah against the factory and obtained decrees; and that under those decrees they put up for sale on two several occasions, and bought the right and interest of the factory in the property in question; but that these sales were set aside for irregularity.

Mr. Mackenzie's answer to the suit is, that he bought the right and interest of Hurronath Roy and others, at auction sale, on the 17th of April 1876, which interest was an occupancy right in the 325 beegahs, and that he has been in possession ever since. He says, also, that he has always paid to the plaintiffs, and the other defendants, the rent reserved by the ticca pottah, and that even if he was liable to be turned out by notice to quit, the notice given is not a reasonable or proper one.

The Subordinate Judge has dismissed the suit, and I think he is quite right, though I do not agree in all his reasons for doing so.

The plaintiffs have called several witnesses to prove that the jote of Hurronath Roy and others, consisted of 40 or 50 beegahs only out of the 325 which the factory claim, and that the factory has been in possession of it only ten years.

But the plaintiffs admit that Hurronath Roy and others, took possession of several plots of land so far back as 1858, and that the factory took a ticca lease from Hurronath Roy and others of their shares in the mouzahs under a kabooleut in the same year. This kabooleut is in evidence, and it shows that Hurronath Roy and others, let to the factory their shares in 1,000 beegahs of land, out of which 300 beegahs were said to be their khoodkast right.

1879

JUBRAJ ROY v. MACKENZIE.

Judgment.

GARTH, *C.J.*

It then appears that Hurronath Roy and others, having failed to pay to the factory the rent for these 300 beegahs, the factory brought a suit against them for it, and having obtained a decree, put the khoodkast right up to sale, and bought it themselves. So that this jote of Hurronath Roy and others, whatever its nature and extent may be, would seem to have been in the possession either of Hurronath Roy and others, or of the factory, since the year 1858, and for aught that appears to the contrary, the factory may have gained the right of occupancy in it.

But it is not necessary to decide that point, because even supposing the tenancy of Mr. Mackenzie to be an annual one and liable to be determined by a proper notice to quit, I quite agree with the Subordinate Judge that the notice which has been given by the plaintiffs is not sufficient.

In the first place, the plaintiffs could only determine the tenancy to the extent of their own shares; in the next place the notice was not confined to the jote which belonged to Huronath Roy and others; and, lastly, as at present advised, I think the notice should have been a reasonable one to terminate the tenancy at the end of the Fusli year. The Subordinate Judge probably knows better than we do, what would be a reasonable notice to quit in that part of the country.

The plaintiffs have given no evidence that the notice was a reasonable one; and considering that it was not a notice to terminate the tenancy at the end of the Fusli year, that it was only a thirty days' notice, and that it was given when the crops were ripening, and therefore at a time most inconvenient and injurious to the tenants, I certainly am not disposed to differ from the Subordinate Judge upon that point.

But then the plaintiffs have contended that, if the notice not a reasonable one, this Court ought to determine for itself (without any evidence) what notice would be reasonable; and then declare by its decree at what time Mr. Mackenzie's interest ought to be considered to have ceased.

My first answer to this is, that apart from the question notice, I am by no means satisfied that the factory have not occupancy right, and in the next place, this is one of those ca

1879

JUBRAJ ROY v. MACKENZIE.

Judgment.

GARTH, C.J.

in which, if I had a discretion, I should certainly exercise it in the defendants' favor.

I am aware that in two cases, decided by this Court, it has been held that where a landlord has given insufficient notice to quit, the Court is at liberty to say what a sufficient notice would have been, and to make a decree for possession accordingly. (See *Mohamed Rasid Khan Chowdhry* vs. *Jadoo Mirda*, 20 W. R., 401; *Hem Chunder Ghose* vs. *Radha Pershad Palest*, 23 W. R., 440.)

I should of course consider myself bound at present by the law laid down in these cases; but I confess I should wish to have them reconsidered, should an opportunity occur, by a Full Bench.

I do not quite see why a landlord, bringing a suit to eject a tenant, should be in a better position than any other plaintiff. A party suing upon a bill of exchange would have his suit dismissed if he brought it before the bill became due. A mortgagee would not be allowed to sue for foreclosure before the day had arrived for payment of the mortgage money. A landlord would not be allowed to sue his tenant for possession during the continuance of a pottah which he or his ancestor had granted; and I do not understand why a landlord, who sues for khas possession, before he has terminated his tenant's interest by a proper notice to quit, should be in a better position.

The above cases, however, go no further than this:—That it is in the discretion of the Court in each case, if it pleases, to give the landlord a decree upon fair terms; and, therefore, in such a case as the present, even if there were no other objections to the suit, I certainly should not be disposed to exercise my discretion in the plaintiffs' favor.

I think, therefore, that this appeal should be dismissed with costs.

PRINSEP, *J.*:— PRINSEP, *J.*

The plaintiffs are part proprietors of Mouzah Bhugwanpore, Kaswa and Pertabpore; the defendants, second party, representing the other sharers. They sue to eject the defendant Mackenzie after service of notice to quit.

1879

JUBRAJ ROY v. MACKENZIE.

Judgment.

PRINSEP, *J.*

It appears that the two sets of co-sharer proprietors have been quarrelling about a subordinate holding, which some of them, Hurronath Roy and others, claim. The plaintiffs state that during the pendency of the litigation, and the decision of the first Court in their favour, Hurronath Roy and others, managed to get possession of some of the land, and subsequently gave the defendant Mackenzie, or rather his predecessor, on the 31st January 1858, a ticca lease for seven years, in which the holding was specified as 300 beegahs khoodkast land of Hurronath Roy and others. On the 22nd April following, a ticca lease for the remainder of this property was granted by the plaintiffs also for seven years, and it is remarkable that in it no mention was made of the khoodkast land. In the course of 1862, the defendant Mackenzie's predecessor sued Hurronath Roy and others, for rent of this holding; and, having obtained a decree, sold it in execution, purchasing it himself, and whatever that holding may be, he has since held possession of it, and plaintiffs have admittedly received money in payment of rent from 1270 to 1280 Fusli. The plaintiffs subsequently obtained a decree against Stewart and Wilson, defendant Mackenzie's predecessors, for the rent due under the ticca lease, and in execution they twice attempted to sell this holding, but the sale on each occasion has been set aside owing to some irregularity in the proceedings.

The first and main objection taken is, that the notice to quit was served at a wrong time of the year, and that the term, 30 days, for vacating the land, was too short.

I observe, in the first place, that, though plaintiffs set forth in their plaint that the litigation between them and Hurronath Roy and others, terminated in their favour, they have omitted to produce anything from which this can be learnt. They have produced only a copy of a judgment of the late Sudder Court, rejecting an application for review of judgment; but there is nothing in that proceeding, or in any other paper on this record, to show what was the subject of that suit. So far then, for the purposes of this suit, we must take it, on plaintiff's own statement, that Hurronath Roy and others, have held some lands as tenants for some time previous to 1858. It is also clear that the land was held by defendant Mackenzie's predecessor, and it is admitted that

s have received rents for that land from 1276 to 1280, but y have attached and twice attempted to sell the tenure it to amount to 325 beegahs. What is the exact nature of ling, (in fact, whether it is a valid holding,) and what is its and its rent, are left in the greatest doubt, owing very unsatisfactory manner in which this case has ied. Two attempts were made by the Court Ameen e the holding, but his proceedings were not accepted by -Judge, who has found that it has become difficult to the lands because defendant Mackenzie has "put all the ito disorder," and has "erected *pucka paya* on all sides." states that the "marks" of the plots, by which I under- e boundaries, "are not then in the same state." I agree remarks, and I find that some of the ryot witnesses for ntiffs have deposed that defendant Mackenzie has recently hem from their lands, and has included those lands within *a* (pillars). I think it necessary to mention all these ecause, though I agree with the learned Chief Justice that ice to quit is a bad notice for the reasons stated by the nt; if plaintiff had proved that defendant was holding legal title, I should have been inclined to follow the deci- f this Court, and hold that we should pass a decree for the nt of the defendant on some future date which would have no injury to his cultivating operations. I do not think ssary at present to state the grounds on which, in my , this course, which has been adopted by other Benches Court, is correct, because the point does not arise in this nt I think it necessary to state, that at present I concur ese decisions, because the learned Chief Justice has ques- he correctness of the law laid down, and has expressed his have this matter considered by a Full Bench.

o desire to state, that I do not find in the evidence in this t defendant has established any right of occupancy as laintiffs.

nfortunate that the law should not have defined when a wing no permanent right, can be called upon to vacate , and what notice should be given to him; but I think wing the rule for notices of enhancement, the notice

1879

served on 25th February, and giving 30 days' notice, has neither been served at a proper time of the year nor has it given a sufficient term. I do not mean to say that a notice to quit may not be served at any time during the year, but it must give a sufficient interval to the tenant to vacate, and if served in the middle of the year, when it would disturb all cultivation, it would not be a proper notice, unless it gave a time for leaving the tenure when that cultivation shall have come to an end.

Finding, therefore, that plaintiffs have failed to serve defendant Mackenzie with a proper notice, I agree in dismissing the appeal with costs.

[CRIMINAL APPEAL.]

October 11th. IN THE MATTER OF BEHARI HAJDI . . . APPELLANT.

No. 587 of 1879.

Criminal Procedure Code, Act X of 1872, *sections* 122 *and* 546—*Confessions—Evidence.*

Section 122 of the Criminal Procedure Code (Act X of 1872) does not apply to a confession recorded by a Magistrate acting under Chap. XV or Chap. XVII, but to a confession made by a Magistrate other than the Magistrate by whom the case has to be enquired into or tried; and to a confession made during, or before the commencement of, an investigation by the police.

CRIMINAL APPEAL from a conviction passed by the Sessions Court of Burdwan.

Moonshee *Serajul Islam* appeared for the Prisoner.

The facts are fully set forth in the judgment of the High Court (1), which was follows :—

The prisoner having been convicted of murder in the Sessions Court of Burdwan, and having been sentenced to death, his case has come up to this Court on a reference by the Officiating Sessions Judge under section 289 of the C. C. P., as well as on an appeal by the prisoner against the conviction.

(1) WILSON and TOTTENHAM, *J.J.*

1879

In re BEHARI HAJDI.

Judgment.

The conviction may truly be said to rest entirely upon a confession made by the prisoner before the Joint Magistrate of Burdwan on the 30th of July. If that confession be admissible in evidence, and if it be believed, the conviction is undoubtedly sound. If the confession be disregarded, the conviction cannot be sustained.

The Judge admitted the confession without demur, and charged the Jury to convict if they believed it. A verdict of guilty having been returned, the Judge convicted the prisoner and passed sentence of death. He then proceeded to record a note for the consideration of this Court that, under a Full Bench decision of the High Court of Bombay in *Bai Ratan's* case, 10 Bom. (F. B.) H. C., 166, the conviction is not maintainable, the confession bearing neither the signature nor the mark of the accused. In his letter of reference he calls attention to the same case, and to a case lately decided in this Court—*Empress v. Manu Panioli*, 4 C. L. R., 137, and I. L. R., 4 Cal., 696, in which the decision of the Bombay Court was approved and followed.

The prisoner's pleader has, on the strength of these cases, contended that the confession in question was not admissible in evidence by reason of defects upon the face of the document; and that these defects could not be amended by further evidence taken in the Sessions Court under the last part of section 346 Cr. C. P.

We fully assent to the ruling contained in the decision above cited. That ruling is simply that a confession recorded under section 122 C. C. P. is not admissible in evidence against the person making it, unless it has been recorded with all the formalities prescribed by law; and that a confession under section 122 is not an examination taken in the course of a preliminary inquiry which, by section 346, may be supplemented by evidence in the Court of Session as to the fact that the recorded statement was made by the prisoner.

Our decision in the present case must depend upon whether we hold the confession to have been one under section 122, or the examination of the accused under section 193 during a preliminary enquiry by the Committing Magistrate. If it was the

1879

In re BEHARI HAJDI.

Judgment.

latter, there is evidence on the record, taken in the Sessions Court, which remedies all defects of form under section 346.

On the face of the proceedings in the Sessions Court, there is nothing to suggest a doubt that it is what it purports to be an examination by the Committing Magistrate. But in order to satisfy ourselves upon this point, and to enable the prisoner's pleader to make his case as strong as he could, we adjourned the hearing of the case and sent for the record of the proceedings before the Magistrate which had not accompanied the reference in the first instance.

The first ground upon which the prisoner's pleader asks us to hold that the confession was in fact one under section 122 is that the Magistrate attached to it a certificate that it was in his belief made voluntarily; such certificate being prescribed by law for a confession under section 122, and not being required in respect of other confessions.

We do not think that there is any force in this argument. The presence or absence, or form or want of form, of a certificate that the statement was voluntary, cannot show under what circumstances the confession was made, nor will it alter the fact whatever it was. If a confession be made under circumstances contemplated in section 122, the absence of the requisite certificate will not alter it into an examination taken in a preliminary enquiry, and similarly a superfluous certificate added to such an examination will not convert it into a confession under section 122. What the circumstances were, must be ascertained independently of any certificate. The second ground put forward for holding the confession to be under section 122 C. C. P., was that it was made on the 30th of July, several days before the examination of the witnesses, which was on the 4th of August, and for this purpose the Magistrate's record is referred to. But if that record is to be used, the whole must be considered, and it seems to us, on examination of the Magistrate's record, impossible to hold that the prisoner's confession was under section 122 C. C. P. That section applies, we think, to a confession made to a Magistrate other than the Magistrate by whom the case has to be inquired into or tried out, who may not even have jurisdiction to inquire into or try it; and to a confession made while the

1879

In re BEHARI HAJDI.

Judgment.

is still under investigation by the Police, or before such investigation has commenced. It does not apply to a confession recorded by a Magistrate acting under Chapter XV or Chapter XVII of the C. C. P.

In the present case, the confession was made to the Magistrate who enquired into and committed the case to the Sessions; and the Magistrate was then acting, we think, under Chapter XV. The confession was made when the case was no longer under investigation by the Police, and when the prisoner had been brought before the Magistrate under section 190 of the C. C. P. The enquiry by the Magistrate thereupon commenced, and his examination of the prisoner from that moment came under section 3. It is not the common case of a prisoner confessing to the Police in the course of their investigation, and being sent in at once to the nearest Magistrate for the purpose of having the confession recorded before he may have changed his mind about making it. In this case the murder was committed, and the police investigation was completed nine years ago. That investigation pointed to the prisoner as the murderer; but he having disappeared from the locality, could not then be arrested. In July of this year, it seems from the Magistrate's record, that the Joint Magistrate of Burdwan received information of the prisoner's whereabouts. On the 24th of that month he issued a warrant for his arrest addressed to the Commissioner of Police for Calcutta. The warrant was executed in the Hooghly District on the 29th, and the prisoner, with his companion, the widow of the murdered man, was brought from Hooghly, and on the 30th was placed before the Joint Magistrate of Burdwan in obedience to his warrant. That officer then proceeded to examine the prisoner, who thereupon confessed; and after examining him he sent him to jail, admitted his companion to bail, and directed that the witnesses for the prosecution be sent in. These proceedings were evidently under Chapter XV, sections 193 and 194, and section 122 gives no application to them. On the 4th of August the witnesses for the prosecution were examined by the same Magistrate, and the prisoner was committed to the Sessions.

There is an obvious difference between this case and that reported at page 696, I. L. R., 4 Cal. In that case the Magistrate was

1879

In re BEHARI HAJDI.

Judgment.

clearly not acting under Chapter XV, for when he record confession he was not within the local limits of his jurisd and, as stated by one of the learned Judges of this Cou prisoner was brought before the Deputy Magistrate simp the purpose of having his alleged confession recorded. that confession clearly ceme under section 122.

For the reasons stated we think that the confession in q was fully admissible in evidence at the trial, and that any in respect of the prisoner's signature or mark was cured evidence of the Magistrate's mohurrir who was examined trial.

The confession being good evidence, there remains no q as to the propriety of the conviction, nor can we see any why the sentence passed should be other than capital Session Judge's suggestion that the lapse of time sin murder might be considered as a ground for commutin sentence does not commend itself to our minds. We feel our duty to affirm the conviction, and the sentence o passed upon the prisoner Behari Hajdi. His appeal is acc ly dismissed.

[CIVIL APPELLATE JURISDICTION.]

KOKIL SINGH AND OTHERS . (DEFENDANTS) APPELLANTS ; 1879

AND

DULI CHUND . . . . . (PLAINTIFF) RESPONDENT. Nos. 1310 an. 1393 of 1877

MITTERJEET SINGH AND OTHERS (DEFENDANTS) APPELLANTS ;

AND

DULI CHUND . . . . . (PLAINTIFF) RESPONDENT.

Mortgage—Possession, Suit for, by purchaser at Sale in execution of decree on a mortgage against holder of Mocurrari of subsequent date.

At a sale in 1871, in execution of a decree upon a mortgage, dated 3rd May 1867, A purchased the mortgaged lands, the existence of a mocurrari granted in 1868 having been notified at the sale. *Held*, that a suit by A against the mocurraridars for possession would not lie, the existence of the mortgage being no bar to the creation of a subsequent incumbrance carrying with it the right of possession.

Syad Emam Momtazuddeen vs. *Raj Coomar Das*, 23 W. R., (F. B.) 187; *Gopee Bundhoo Shantra Mohapatter* vs. *Kalee Pudo Bannerjee*, 23 W. R., (F. B.) 187; *Sawruth Singh* vs. *Bheenuck Sahoo*, 12 W. R., 522; *Sarawan Hossein* vs. *Shahazadah Golam Mahomed*, 9 W. R., (F. B.), 171; *Gopeenath Singh* vs. *Sheo Sahoy Singh*, 1 W. R., (F. B.), 315, discussed.

APPEALS against decisions of the Officiating Judge of Gya, affirming decrees of the Subordinate Judge of that district.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Chunder Madhub Bose*, and Baboo *Kali Mohun Dass*, for the Appellants.

Baboo *Hem Chunder Bannerjee*, and Baboo *Nil Madhub Sen*, for the Respondent.

The facts are sufficiently set forth in the following judgments of the High Court (1) :—

AINSLIE, *J.* :— AINSLIE, *J.*

These two suits are in their principal features analogous, but there is one point in which they differ, which will be noticed later on.

(1) AINSLIE and MCDONELL, *JJ.*

1879

KOKIL SINGH v. DULI CHAND.

Judgment.

AINSLIE, J.

On the 22nd May 1867, Gouri Byjnath Pershad mortgaged certain properties as security for a debt of Rs. 25,225.

On the 5th June 1868, an account was taken, showing an outstanding balance of Rs. 16,574, for which he gave a new bond again mortgaging the same properties as security.

The creditors having brought a suit on this bond obtained a decree on 3rd February 1871, and thereunder sold the mortgaged properties in numerous lots, some of which the plaintiffs purchased.

The defendants in suit No. 1310, who are in possession of a portion of the mortgaged property, claim it by virtue of a mocurrari grant, dated 17th April 1868.

The defendants in No. 1393 are in possession of another portion of the mortgaged property, which they claim under another mocurrari grant, dated 4th April 1868. In this case the defendants allege that the property in dispute had been leased under a zurpeshgee lease on 18th August 1862 to Goudur Singh on a bonus of Rs. 2,200, and that when he (defendant) agreed to give Rs. 5,000 as a bonus for the mocurrari, the former sum was reserved, and was afterwards paid to the plaintiffs, the zurpeshgee lessees. In this suit the defendant claims a right to fall back upon the first mortgage of 1862 redeemed by him.

In both instances the existence of the mocurrari was notified at the time the property was sold.

The plaintiffs sue to eject the defendants or to obtain such other relief as, under the circumstances, the Court deems equitable.

The Subordinate Judge decreed in favor of the plaintiffs for possession.

The District Judge, on appeal, affirmed both decrees, holding that the mortgage of 1867 had been kept on foot, and that the transaction of 1868 was not a new and independent mortgage, and consequently that both the mocurraris, being of later date than the mortgage of 1867, were inoperative to create a title against the mortgagee. In the second case (which forms the subject of appeal No. 1393) it was urged that the plaintiff was bound to pay back the sum of Rs. 2,200 before taking possession. The Judge declined to consider this plea on the ground that it had not been urged below.

The defendants in appeals Nos. 1310 and 1393 contend that, even admitting the plaintiffs' right to rely on the mortgage of 1867, as to which the Courts below were, in my opinion, right, they had a right to redeem; and, as they were no parties to the suit which terminated in the decree under which plaintiffs purchased, they cannot be turned out of possession without an option of redeeming. In No. 1393 the defendant further urges that he is at least entitled to recover the sum of Rs. 2,200 which was charged on the property at the time when the mortgage on which plaintiff relies was created, and which was subsequently paid off by himself.

Further it is said that it is not found as a fact that the particular properties which form the subjects of these suits were ever included in the mortgage of 1867. The answer of the respondent to this last objection is, that the first Court found the properties to be included in the mortgage, and that the question, which is purely one of fact, was not raised in the lower Appellate Court. This answer appears to be sufficient.

On the first point, the appellants rely upont he Full Bench judgment in the case of *Syud Emam Momtazuddeen Mahomed* vs. *Raj Coomar Das*, 23 W. R., 187. The Chief Justice, delivering the judgment of a majority of the Court, said in the course of his judgment: "An order of sale cannot conclude persons not parties to the suit. * * * If there be persons not parties to the suit claiming an interest in the property, no form of dealing with the property in their absence can prejudice their rights." Nothing was said as to what these rights might be, but in a subsequent case—*Gopee Bundhoo Shantra Mohapatter* vs. *Kalee Pudo Mookerjee*, 23 W. R., 338, MARKBY and MITTER, *J.J.*, held that where there had been a sale at the instance of the first mortgagee in a suit to which a second mortgagee was not a party, and he had himself become the purchaser, the second mortgagee was entitled to pay off the debt for which the property was sold, and therefore to treat the purchaser as owner of the estate subject to his own mortgage. This decision must, however, be read with the decision of Mr. Justice MARKBY in special appeal No. 1665 of 1877, decided on the 14th September 1878, (unreported), but before proceeding to that I propose to examine the judgment in the Full Bench case.

1879

KOKIL SINGH v. DULI CHAND.

Judgment.

AINSLIE, J.

The question referred to the Full Bench was, whether a creditor, who has resorted to the summary procedure provided by section 53, Act XX of 1856, and has recovered a portion of his claim in execution of the decree so obtained, is afterwards at liberty to bring a regular suit for the enforcement of his remedies under the bond, merely giving the defendant credit for such amounts as he has already recovered.

The reference order shows clearly by quoting sections 2 and 7, Act VIII of 1859, that the question was restricted to the case of a second suit *between the same parties*.

The first question to be decided was, whether proceedings under section 53 of the Registration Act of 1866, are to be deemed a suit. The Chief Justice, in his judgment, after considering this question on other grounds, proceeded to compare the remedy obtainable under section 53 with that obtainable under other forms of proceeding, and arrived at the conclusion that they were identical. Mr. Justice MARKBY concurred in this view. Mr. Justice JACKSON thought that there was a difference; but that a decree under section 53 of the Registration Act is equivalent to an ordinary money-decree made in a regular suit in which a special order of sale is not sought. He considered such a decree to put the decree-holder in a distinctly less favorable position, as regards third parties, than he would be in with a decree embodying an order for sale, though not made against such third parties. Thus the question of the effect of a sale of mortgaged property under a simple money decree in respect of a debt secured by a mortgage as compared with the effect of a sale under a decree specially directing the sale of the security arose incidentally, and it was not necessary to determine anything beyond the effect of such decrees *between the parties*; and that effect was held to be identical in the words of Mr Justice MARKBY: "A money-decree against the debtor himself is neither better nor worse than a decree against the debtor himself which declares the lien." These words would have sufficiently answered the incidental question as to the nature of the remedy in different forms of proceedings which arose in this case.

Mr. Justice MARKBY observed that, "as regards third par-

1879

KOKIL SINGH v. DULI CHAND.

Judgment.

AINSLIE, *J.*

not parties to this or the former suit, the result is the same, whether the property be sold under a money-decree or under a decree declaring the lien. Their rights are not affected more or less in the one case than in the other. As against third parties the declaration of the lien contained in the decree can have no operation whatsoever; *they* can only be affected by a declaration in a decree in a suit to which they have been made parties."

The Chief Justice said:—"Thus, whether the decree do or do not direct the sale of the mortgaged property, the mortgagee, when he puts that up for sale, sells the entire interest that he and the mortgagor could jointly sell." Mr. Justice MARKBY said, "the purchaser takes all that the creditor, as well as the debtor, is able to convey."

Thus it seems to me that these learned Judges agreed as to the effect of a decree *between the same parties*, whether it be in form a mere money-decree or contain an order for sale of property—this was all that the Court was then determining.

It has been supposed that the judgment of the majority determines a good deal more than this, and that on the further question decided, there was a difference of opinion between them and Mr. Justice MARKBY.

It clearly was unnecessary to go beyond the effect of the decree as between the parties to the mortgage contract, for a proceeding under section 53 of the Registration Act must of necessity be between the parties to the contract and them alone, and therefore the question whether section 2 or section 7, Act VIII of 1859, would affect a further suit to recover money on the same bond, could only arise in respect of the same parties. It had, however, been said that a mortgagee selling mortgaged property otherwise than in a suit, in which an order for sale is asked for and obtained, lost the benefit of his mortgage altogether; and in the case of *Sawruth Singh* vs. *Bheenuck Sahoo*, 12 W. R., 522, it was said that the mortgaged property was considered infructuous, if not altogether done away with, by the proceedings adopted by them, (namely, the suing of their debtor for the money due without asking for sale of the mortgaged property) in which they chose *to waive the right of*

1879

KOKIL SINGH v. DULI CHAND.

Judgment.

AINSLIE, J.

selling the property pledged in satisfaction of their mortgage b and to receive instead a simple money-decree: the case, howe was not decided on this ground.

If this observation was good law, it could not be said that remedy under either form of decree, as between the partie the contract, is identical. If the mere fact of taking a mon decree extinguishes the creditor's lien, a sale by a mortgage mortgaged property in execution of a money-decree, may be a v different thing from a sale of the same property at the suit of same creditor under an order for sale embodied in a decree.

But this dictum is irreconcilable with the Full Bench decis in the case of *Gopeenath Singh* vs. *Sheo Sahoy Singh*, 1 W. 315. In that case it was held that, *in execution* of a simple mon decree, the creditor cannot proceed against mortgaged prope *in the hands of a third person*, who has acquired it in good fa and for valuable consideration, but *he must enforce his lien by parate action* against the party in possession of the prope pledged to him. This decision distinctly recognizes the surv of the lien after the taking of a money-decree, and there numerous other decisions to the same effect, of which I will o cite another case before a Full Bench in 1868—*Surwan Hos* vs. *Shazadah Golam Mahomed*, 9 W. R., 171, which was a after a decree obtained against the debtor by a mortgagee agai an alienee of the mortgaged property to charge the debt on property, in which it was held that such a suit was governed the 12th clause of section 1 of the Limitation Act of 1859. never was doubted that such a suit could be entertained. It the fore was necessary in the decision of the case reported in W. R., 187, to consider the case in 12 W. R., 522, and the conc sion arrived at was, that the view taken therein was not correc

Beyond this the decision, as I understand it, did not go. the conclusion of his judgment the learned Chief Justice in cates clearly that he was dealing with a case between the parties a mortgage contract, and with that only. In the penultim paragraph he says, "but inasmuch as he does get the full be fit thereof (of his decree) as against the contracting parties, there is nothing in the fact of his having taken a decree ag them, under that section to restrain him from proceeding ag

third persons by a separate suit." And in the preceding paragraph he says: "The fact that a creditor taking a money-decree has obtained as complete a remedy against the persons sued as he can have *against them*," these last two words being italicized.

Nothing is said of the character of the rights of third parties; and the question of how the lien is to be enforced against them after a sale by the mortgagor is distinctly left undetermined (1st para., page 191).

There is a suggestion thrown out by Mr. Justice MARKBY that, although third parties are not affected by the decree, they may be affected by a sale, and this seems to have been the view he put forward in the case above referred to—Sp. App. 1665 of 1877. But that case was very peculiar, and the purchaser at the sale by the mortgagee was the holder of a subsequently created putni and in actual possession, and the property nevertheless was sold without any decree against him, though he equally with the donee of the original mortgagor was entitled to notice of the suit by the mortgagee. He was in a measure forced by other circumstances mentioned in the judgment to purchase for the protection of his putni from a great risk. As between him and the donee there seems to have been a preponderating equity in his favor.

In the ordinary form of Bengali mortgage there is usually a provision that the debt may be realized by the sale of the mortgaged property; but as no ownership of such property vests in the mortgagee, and the title deeds do not pass into his hands, he has no power to sell independently of the Court. Under the order of the Court there is a sale only of the rights of parties before the Court—in this case only of the rights of the first creditor and debtor.

But the fact of the existence of a first mortgage is no bar to a valid creation of a second mortgage, or to an alienation of the whole interest of the debtor, subject to the debt.

Thus, at the time of this sale, there was a legal title in the mokurraridar, and he had possession, and of this the purchasers had notice. There could not properly be any sale by the Court under the circumstances, except of the rights of the creditor and the outstanding right of the debtor, namely, the right of the former to a charge on the land and of the latter to the reserved

1879

KOKIL SINGH v. DULI CHAND.

Judgment.

AINSLIE, J.

rent. So far as the ownership passed by the creation of the mocurrari which carried possession with it, the sale did not affect the land, and consequently the present suits, as suits to recover possession, must fail.

Then it must be seen whether the plaintiffs are entitled to any decree under the prayer for such relief as the Court may think them entitled to in equity. The plaintiffs have by their purchase acquired (leaving out of consideration the claim of defendants in respect of Rs. 2,200 in appeal No. 1393) a first charge for the first mortgagee's lien on the land, but the mortgaged property consisted of many separately defined portions, though there was no distribution of the debt, and these have been separately sold. How far each purchaser can charge the particular portion of the property in which he has acquired an interest can only be determined by distributing the debt; but for this purpose the proper parties are not before the Court.

If it were otherwise, there might be such a result as this:—Five properties are mortgaged in the lump for Rs. 5,000, and subsequently mocurrari grants are made to five different persons.

The mortgagee sues the mortgagor alone, gets a decree and order for sale, and the properties are lotted separately: Nos. 1 to 3 sell for Rs. 2,000 each, and the sale stops; the mocurraridars of Nos. 4 and 5 would be free of any charge, though they deliberately took subject to an undefined charge. Mocurraris 1 and 2 would be subject to a charge of Rs. 2,000, and 3 to one of only Rs. 1,000, taking them to be sold in this order. Thus it appears that until all parties concerned are brought into Court nothing can be done.

In my opinion the appeals must be allowed, and the suits dismissed with costs in all the Courts.

McDONELL, J. McDONELL, J.:—

I concur in holding that the present suits, as suits to recover possession, must fail, the mocurraridars having a legal title and being in possession, and the purchasers having notice of this. And as regards the plaintiffs' alternative prayer, I am of opinion that, until all parties concerned are brought into Court nothing can be done. I, therefore, agree that these suits must be dismissed with costs in all the Courts.

[CIVIL APPELLATE JURISDICTION.]

HAMA CHURN CHATTERJEE . . . . . APPELLANT;

AND

ROSUNNO COOMAR SANTIKAREE, AND OTHERS . . . . . RESPONDENTS.

1879
Sept. 3*rd.*

No. 497 of 1879.

s-Judicata—Act X of 1877, *section* 13, *Expl. I, (amended by Act XII of* 1879, *section* 6.*)*

In order to constitute the bar of *res-judicata*, it is not sufficient merely that an issue on the same point should have been raised in the former suit, although that issue may have been incidentally decided; but it must appear that the matter referred to was alleged by one party, and either denied or admitted expressly or impliedly by the other.

APPEAL from a decision passed by the Judicial Commissioner of Chota Nagpore, reversing the decree of the Moonsiff of Rughoonathpore.

This was a suit to recover a share in a certain property, the plaintiffs' title being based upon purchase. The property belonged to four brothers, of whom the eldest was the plaintiffs' vendor, and he was said to have possessed a four annas and fifteen gundas share out of sixteen annas. There was an issue as to the extent of his share. For the defence it was contended that this matter was *res-judicata*, there having been a former suit brought by the present defendants against the present plaintiff for damages in respect of crops said to have been cut, and carried away by him from the land belonging to their shares. In that case an issue was laid down as to what was the extent of the shares of the plaintiffs in that suit. The Court, in its judgment, said that the defendant in that suit had acquired the share of one of four brothers, and therefore his share was one-fourth, until he showed the contrary, which the Court said he had failed to do. In the present suit that finding is set up as constituting the bar of *res-judicata*. The first Court, having laid down an issue whether the case was barred by *res-judicata* or not, found in favor of the plaintiff. The Moonsiff says that in the former suit there

1879

SHAMA CHURN CHATTERJEE v. PROSUNNO COOMAR SANTIKAREE.

Judgment.

TOTTENHAM, *J.*

was an issue fixed as to the share of Nuffer, but the issu not decided, and apparently the defendants, who appealed Judicial Commissioner's Court, did not appeal against tha ing of the Moonsiff.

The lower Appellate Court in its judgment says: "In plaintiffs' pleader (who began) defended the judgment lower Court in this issue, but defendant's (appellant's) p did not go into the point, and it is not among the written gr of appeal." But he says: "As it seemed to me, howeve the suit was really barred on this ground, I brought it notice of the plaintiffs' pleader, who argued the question." then proceeds to give judgment that the suit is barred by s 13 of Act X of 1877.

Baboo *Kali Kissen Sen*, for the Appellant.

Baboo *Sreenath Dass*, for the Respondents.

The following judgment was delivered by

TOTTENHAM, *J.*

TOTTENHAM, *J.*—(who, after stating the facts, proceed follows):—

It appears to me that the lower Appellate Court was in in holding as it did. Section 13 of the Procedure Code "No Court shall try any suit or issue in which the matter d and substantially in issue has been heard, and finally decide Court of competent jurisdiction in a former suit betwe same parties or between parties under whom they or any of claim litigating under the same title." No doubt in the pr suit an issue was laid down as to what was the share of the plaintiffs, now defendants; but I do not find that there w distinct inquiry into, or any definite finding upon, that The finding of the Court, that has been read to me by the p for the respondents, is simply upon the point as to wheth crops had been cut and carried away by the then defend not. The Court did mention that the defendant's share wo one-fourth, unless he showed the contrary; but it does not that he had been called upon to show what his share wa order to constitute the bar of *res-judicata*, it is not n merely that an issue shall have been laid down in the p suit on the same point, but the explanation 1 to section 1

1879.

SHAMA CHURN CHATTERJEE v. PROSUNNO COOMAR SANTIKAREE.

Judgment.

TOTTENHAM, *J.*

but "the matter above referred to must, in the former suit, have been alleged by one party, and either denied or admitted (see amending Act) expressly or impliedly, by the other." The decree in the former suit, which has been put in in this suit, does not show any express allegation or any express denial or admission as to what was the present plaintiffs' share. It appears to me, therefore, that the issue in the former suit, and such finding as there was upon it, were merely incidental, and no bar to a full investigation in the present case.

The lower Appellate Court did not go into any other points in the case, but dismissed the suit upon this single issue. The decree of the lower Appellate Court must, therefore, be set aside, and the case remanded to that Court to be tried on the other points. Costs will abide the result.

The appellant is entitled to a refund of the stamp duty paid upon the petition of appeal in this case.

[CIVIL APPELLATE JURISDICTION.]

ABDUL KUREEM AND ANOTHER (JUDGMENT-DEBTORS) . . . . . } APPELLANTS;

AND

CHUKHUN AND OTHERS (DECREE-HOLDERS) . . RESPONDENTS.

Sept. 9th.

No. 109 of 1879.

Civil Procedure Code (Act X of 1877) section 232—Transferee of Decree—Benami—Limitation Act, XV of 1877, Sched. II, Art. 179 (4).

Where an application for execution of a decree made under section 232 of the Civil Procedure Code was disallowed on the ground that the applicants had not shown, as they alleged, that they were the persons beneficially interested in a transfer of the decree taken in the benami name of a third person, and within three years from the date of such application a subsequent application was made by them, in which their allegation was proved to be correct, *Held* that the former application had been a proper application within the meaning of the section, and that the latter was therefore, under Art. 179, Sched. II of the Limitation Act (XV of 1877), within time.

APPEAL from an order passed by the Subordinate Judge of [illegible].

In this case an application was made on the 5th May 1875, for execution of a decree dated the 22nd February 1874, and after-

1879

ABDUL KUREEM v. CHUKHUN.

Judgment.

wards affirmed on appeal. Pending this application, another application was made by one Amjad Ali that his name might be substituted as transferee of the decree in place of those of the original decree-holders. This was granted, and subsequently the execution case was struck off the file, it being represented to the Court that the judgment-debtor had agreed to pay the amount of the decree. On the 1st of December 1877, however, an application to have the decree executed was made by the respondents under section 232 of the Civil Procedure Code. They alleged that Amjad Ali was only the benamidar of their late father through whom they claimed.

The application was disallowed, the Court not being satisfied that this allegation was correct. Subsequently another application was made under the same section on the 10th August 1878, by the respondents, but on this occasion Amjad Ali admitted that he had been merely benamidar as alleged.

Execution was accordingly directed to issue.

The judgment-debtors thereupon appealed on the ground that the application of the 10th August 1878 was barred by limitation, as having been made more than three years subsequently to the original application of the 5th May 1875.

Mr. *M. L. Sandel*, for the Appellants.

Moonshee *Mahomed Yusoof*, and Baboo *Saligram Singh*, for the Respondents.

The judgment of the High Court (1), which was as follows, was delivered by

MITTER, *J.* MITTER, *J.*:—

We think that in this case the lower Court has come to a right conclusion.

The decree is dated the 22nd February 1874, and it was subsequently affirmed in appeal. The decree-holder, Ameerooddeen and another, on the 5th May, applied for execution. While the application was pending, one Amjad Ali, on the 29th of July 1875, applied to the Court to be substituted in the place of the original decree-holders, alleging that he had purchased the decree

(1) MITTER and TOTTENHAM, *JJ.*

from them. The decree-holders admitted the sale, and Amjad Ali's name was substituted. It appears that subsequently, on the 28th August 1875, two months' time was allowed to the judgment-debtor, the appellants before us, to pay off the amount covered by the decree, and on that day the execution case was struck off. On the 29th November 1877, some of the respondents before us made an application to execute the decree under section 232 of the Procedure Code. They alleged in that application that their father Bizaut Hossein purchased the decree in question in the *benamee* name of Amjad Ali. This application, although it is dated the 29th November 1877, was brought on before the Court on the 1st December 1877. Subsequently on the 18th March 1878, it was refused upon the ground that the appellants had failed to satisfy the Court that the decree had been transferred to them by an assignment in writing or by operation of law. After this an application by the present respondents, dated the 29th July 1878, was filed in Court on the 10th August 1878, to execute the decree upon the same allegation. Upon that Amjad Ali came, and, admitting that the sale to him was a *benamee* sale, and that the real and beneficial transferee was the father of the applicant, the lower Court allowed the decree to be executed. The judgment-debtors then appeared and pleaded limitation. They contended that the application of the 29th November 1877 was not a proper application within the meaning of Article 179 of the Limitation Act, and, therefore, that the present application, which is dated 10th August 1878, having been filed more that three years from the date of the first application, viz., the 5th May 1875, or, from the date of any other application for the purpose of taking some steps in aid of the execution, the decree is barred by limitation.

The lower Court has overruled this objection and has allowed the decree to be executed. We are of opinion that the decision of the lower Court upon the point is correct. Article 179, Clause 4, allows three years for the execution of a decree from date of applying, in accordance with law, to the proper Court for execution.

The question, therefore, that we have to determine in this case is, whether the application of the 29th November 1877 was

1879

ABDUL KUREEM v. CHUKHUN.

Judgment.

MITTER, J.

an application, in accordance with law, to the proper Cour execution. There is no question, that the Court to which application was made was the proper Court to execute the de The only question is, whether that was an application in acc ance with law for execution.

Now section 232 says:—If a decree be transferred by ass ment in writing or by operation of law from the decree-holde any other person, the transferee may apply for its execution to Court which passed it.

We think that the application of the 29th November 1 comes within the purview of this section. It has been conte before us that the section in question contemplates an appl tion by a person whose name appears in the assignment in w ing as the transferee. The contention is this,—that under sec 232 the Court executing the decree should not recognize *bena* transfers.

We are of opinion that this contention is not valid. section says that where a decree is transferred by an assignm in writing, the transferee may apply. The *benamee* syste recognized in this country, and a *benamidar* is not a transfere the decree. The section only authorizes the Court to allow transferee of the decree to apply for execution. If the *benam* is not the transferee, he has no *locus standi* under section The person who is the beneficial owner is entitled under sec 232 to apply to execute the decree.

We are, therefore, of opinion that the application of the November 1877 is a proper application within the meanin section 232. That being so, the present application being wi three years from that date, is not barred by limitation. dismiss the appeal with costs.

[PRIVY COUNCIL.]

HURRO SUNDARI DEBIA . . . . . APPELLANT;

AND

KESUB CHUNDER ACHARJYA . . . . RESPONDENT.

1879
May 7th.

Partition—Butwara, Evidence of—Regulation XIX of 1814*—Division, Mode of.*

Proceedings for partition having been instituted under Regulation, XIX of 1814, it was proposed, in order to make equality of partition that three villages should be divided in unequal proportions, and a *goshwara* was accordingly prepared by the Ameen, setting out in one column the extent of the shares to be allotted, and in another the assessed jumma of each share allotted.

In a suit in 1873 by the representatives of one of the shareholders to recover portions of the three villages, the only evidence that the partition had been completed was an *istahar* of the Deputy Collector, dated October 1864, directing the Nazir to require the ryots to pay their rents according to the extent of the shares as set forth in the first-mentioned column of the *goshwara;* that is, according to the quantity instead of according to the quality and value which were the basis of the partition.

Held, (affirming the judgment of the High Court), that the plaintiff, having failed to prove any order for partition drawn out, under section 13 of the Regulation, by the Collector, was not entitled to recover according to the quantity of the land, but if at all, according to its value as ascertained in the column of the *goshwara* in which the assessed jumma was set forth.

APPEAL from a decision of a Divisional Bench of the High Court of Judicature at Fort William in Bengal.

Doyne and *Chalmers,* for the Appellant.
Cutler, for the Respondent.

The facts of the case are set out in the judgment of the Judicial Committee (1) of the Privy Council, which was as follows:—

This is a suit brought by Hurro Sundari Debia, the widow of the late Anund Chunder Acharjya, against Ishan Chunder

(1) Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

1879

HURRO SUNDARI DEBIA v. KESUB CHUNDER ACHARJYA.

Judgment.

Acharjya and Kesub Chunder Acharjya, the sons of the late Ra Chunder, by which she seeks to recover certain portions of thre villages called respectively Byara, Kismut Kandania, an Bhatipara.

Anund Chunder and Ram Chunder were brothers, and were entitled jointly to an estate consisting of a portion of Pergunnah Alapsing. Proceedings were taken under Regulation XIX of 1814 of the Bengal Code for a partition of the estate. For this purpose it was divided into three dehas, or circles, called Koomria, Kandania, and Dhanikhola. An Ameen was deputed to make the partition, and according to the *goshwara* or abstract statement prepared by him, which is set out in the supplemental record, each party was to receive certain villages in each of the three circles; but in order to make equality of partition, the three villages, which were the subject of the suit, viz., Byara, Kismut Kandania, and Bhatipara, were proposed to be divided in unequal portions between the two parties. Village Byara was in circle Koomria, Kismut Kandania in circle Kandania, and village Bhatipara in circle Dhanikhola.

The *goshwara*, so far as it related to the villages in question, was divided into several columns: the first contained the names of the villages; the second the extent of the share to be allotted; the tenth the assessed jumma of the share allotted; and the intermediate columns the description of the lands included in the share allotted, such as unculturable waste land, culturable waste land, assessed land in cultivation, &c.

It appears that the three circles were intended to be divided in such a manner that each party was to receive villages and portions of villages, of which the assessed jumma of those included in circle Koomria was stated to be Rs. 10,735 odd, of those included in circle Kandania Rs. 3,118 odd, and of those included in circle Dhanikhola Rs. 3,059 odd.

Those amounts were inclusive of the amounts which in the *goshwara* were stated to be the assessed jummas of the portions of the three villages intended to be allotted to the respective parties. For instance, the sum of Rs. 305 odd, stated to be the assessed jumma of the share of village Byara, proposed to be allotted to the plaintiff, was included in the Rs. 10,735, the

assessed jumma of the whole of her share of circle Koomria, in which the village was situate, whilst the sum of Rs. 371 odd, stated to be the assessed jumma of the defendant's share of the same village, was included in the sum of Rs. 10,735, the assessed jumma of his share of that circle.

It should be remarked that, although the portion of the village proposed by the Ameen to be allotted to the plaintiff was greater than that proposed to be allotted to the defendant, the former being 2-14-2-2, and the latter 2-12-0-1, the assessed jumma of the proposed share of the defendant was greater than that of the plaintiff. This is accounted for by the fact that the share of the plaintiff contained more unculturable waste land than the share of the defendant, whilst the quantity of assessed land in cultivation in the plaintiff's share bore the proportion to the assessed land in cultivation in the defendant's share of 79 to 100.

In England, if a man claims property under a title derived through a sale in execution of a judgment to which he is a party, it is not sufficient to prove the writ of execution, but he must prove the judgment in order that the Court may see that the writ of execution was warranted by the judgment. So here the plaintiff ought to have proved the order of partition drawn out by the Collector in pursuance of section 13 of the Regulation. But no such order was produced or put in evidence, and there is nothing except the *istahar* of the Deputy Collector to show that the partition of the villages was ever completed. The plaintiff in her plaint alleges that the butwara was approved by the Sudder Board of Revenue, but there was no evidence to that effect. It is evident from the *goshwara* that the shares of the three villages were intended to be divided by metes and bounds, otherwise the Ameen could not have stated the quantity of unculturable waste and of assessed land in cultivation, and of the other description of lands intended to be included in each of the shares. The plaintiff states in her plaint that the shares of the villages were not definitely demarcated, but remained undivided and joint. She relies upon the *istahar* of the Deputy Collector of the 4th October 1861, directed to the Nazir of the Collectorate, directing him to require the ryots to pay their rents to the plain-

1879

HURRO SUNDARI DEBIA v. KESUB CHUNDER ACHARJYA.

Judgment.

tiff and to the opposite party according to the shares stated in the schedule thereto, in which the shares were stated as in the second column of the Ameen's *goshwara*, instead of in the tenth column thereof, thus fixing the shares according to the quantity instead of the quality and value thereof, which were the basis of the partition. For instance, the plaintiff's share of Byara was stated to be 2-14-2-2, and the defendant's 2-12-0-1, which gave the plaintiff a larger share in quantity without referring to the quality of the land, or to the fact that in the *goshwara* the assessed rent of the plaintiff's share was less than that of the defendant's share. It is clear, therefore, that if the butwara was completed according to the Ameen's report, the *istahar* was not warranted by it.

The plaintiff's case was, that in the year 1861, she was put into possession according to the share stated in the schedule to the *istahar*, and that she was dispossessed by the defendants in 1865 of so much of the villages as was in excess of a one-half share thereof.

It was remarked by Mr. Cutler, and it appears to their Lordships that the remark is entitled to considerable weight, that from 1865 the plaintiff did nothing until 1873, when she presented a petition, which is to be found at page 121 of the Record, in which she stated:—"There was no division of the lands and rent thereof, and as the lands and rent of the villages given in the schedule have not been demarcated and divided, there is great inconvenience in cultivation, habitation, and collections," &c., and therefore she prayed that a butwara might be made dividing the villages according to metes and bounds, and to have a regular partition made of them. The Collector ordered "that a purwannah be issued to the Ameen to measure all the lands of the villages mentioned in the petition, and according to the quantity of the lands and the number of dehas, first to separate the lands in the petitioner's shares, and then to prepare a saham of the shares of the proprietors of mehals, the subject of partition;" in fact he ordered that there should be a regular partition of the villages. That order was made by the Collector on the 6th September 1873. Nothing appears to have been done upon it, but on the 30th Septem-

1879

HURRO SUNDARI DEBIA v. KESUB CHUNDER ACHARJYA.

Judgment.

1873, the plaintiff commenced her suit, seeking to recover the proportions of the three villages according to the second column in the Ameen's *goshwara*, as ordered by the *istahar*. The Judge of the First Court acted upon the *istahar*, and held that the plaintiff was entitled to recover the rents of the three villages according to the proportions given in the second column of the Ameen's *goshwara*, but the High Court considered that the Subordinate Judge had misunderstood the butwara and the Ameen's report, and they considered that it was intended to divide the villages, not according to the proportions mentioned in the second column, that is to say, according to the quantity of the land, but according to the value thereof as ascertained in the column defining the fixed jumma thereof. They say :—" It is admitted on all hands that the butwara affected no separate definition of lands in those villages in which each shareholder had a division of interests. In mouzah Byara, for example, the saham paper records that the total amount of rent-paying lands, appertaining to defendant's share, is 116 puras odd, of which 4 puras odd are unculturable or fallow, and the balance, 112 puras odd, are paddy lands, and that the gross rental is Rs. 371-2-9. On the other hand, the total amount of rent-paying lands, appertaining to plaintiff's share in this village, is 127 puras odd, of which 41 puras odd are unculturable or fallow, and the balance, 86 puras odd, paddy lands, while the gross rental is Rs. 305-6-0. There is thus the anomaly presented of the larger gross area of land falling to the plaintiff's share, carrying with it a smaller rental than the lesser area assigned to the defendant's share. The same divergencies between area and rental exist in respect of the other two villages of Kundama and Bhatipara. It is thus at once apparent that the specification of shares, which appears in the second column of the saham paper, has reference not to the proportion of the rent due to and realizable by each shareholder, but to the total quantity of the land held by him in each village ; and the fact that the rental is not in proportion to the total area, is evidently attributable to the character of the lands apportioned."

It appears to their Lordships that the High Court were right in that view of the butwara, and that the plaintiff is not entitled to recover according to the quantity of the land, but that if she

1879

HURRO SUNDARI DEBIA v. KESUB CHUNDER ACHARJYA.

Judgment.

was entitled to recover at all, it ought to be in proportion to the rents specified in the last column. It appears to their Lordships that the plaintiff had to make out her title. No order of the Collector for the butwara was proved. The Ameen had no power to make it, and it never was completed as regards the three villages in question, which, according to the Ameen's report, must have been intended to be divided by metes and bounds. The plaintiff derived no title from the butwara to recover the land in the proportions claimed, nor is it equitable that she should do so.

Under these circumstances, their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and the appellant must pay the costs of this appeal.

[PRIVY COUNCIL.]

May 21st.

SURUT SOONDARI DEBYA . . . . . APPELLANT;

AND

PRANGOBIND MOZOOMDAR AND OTHERS . RESPONDENTS.

Enhancement of Rent.

In a suit by the mother of the then zemindar of a taluq for enhancement of rent, a decree was made in 1821, in terms of a compromise enhancing the rent from Rs. 1,600 to Rs. 2,000. A subsequent suit, in which rent was claimed at Rs. 3,200, was finally decided in 1862, the compromise being thereby set aside, and the liability of the taluq to enhancement finally established. The Ameen's report, which fixed the rent payable at Rs. 8,124, was not, however, made until 1869.

In a suit to recover rent at Rs. 8,124 for the year 1871-72, the Subordinate Judge gave a decree for Rs. 5,062-15-6, a re-measurement of the taluq having shown a decrease in the amount of culturable land.

Held, reversing the decision of the High Court, that the Subordinate Judge was right in making such a decree.

APPEAL from a judgment of a Divisional Bench of the High Court of Calcutta, reversing a decision of the Subordinate Judge of Mymensing.

Doyne for the Appellant.

1879

SURUT SOONDARI DEBYA v. PRANGOBIND MOZOOMDAR.

Judgment.

The facts will be found in the judgment of the Judicial Committee of the Privy Council (1), which was as follows :—

This was a suit brought in the Court of the Subordinate Judge of Mymensing by Rani Surut Soondari Debya, who is the zemindar of a ten annas share of a Pergunnah called Pookhooria, against the respondents, who are the taluqdars of a dependent taluq, which has the name of Gopalpore, and consists of eight mouzahs. The suit was brought to recover rent for a year from the 12th April 1871 to the 11th April 1872, at the enhanced rate of Rs. 8,124 and a fraction. The plaint refers to a decree in previous proceedings, by which the taluq was declared to be held at an enhanceable rent; but, instead of relying simply upon the amount of rent which was found to be the enhanced rent in the former suit, takes the form of a plaint for a fresh enhancement. It also refers to a previous notice, which more distinctly refers to the former suit than does the plaint, and more directly bases the claim upon the decree in that suit. The Subordinate Judge entered into an original inquiry as to the rates payable for adjacent lands, and the judgment of the High Court upon the appeal from him turned entirely upon the effect of the evidence taken upon that inquiry, without reference, and it may be said without due reference, to the previous suit.

The previous litigation had extended over a long period of years, and cannot be regarded by their Lordships without extreme regret. It is to be regretted that to settle a question of rent between the zemindar and the taluqdar the lengthy proceedings found in this record should have taken place, and that one of the former suits should have endured for a period of upwards of twenty years.

The history of the case is found in the previous litigation. It appears that at one time this taluq was held at a rent of Rs. 1,662. A suit was brought by Rani Bhoobunmoyi, who was the mother of the then zemindar of the pergunnah, to enhance that rent, in which a decree was made on the 9th February 1821.

It appears from the proceedings in that suit that a rufanamah, or deed of compromise, was put in, by which the rent was agreed

(1) Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

1879

SURUT SOONDARI DEBYA v. PRANGOBIND MOZOOMDAR.

Judgment.

to be raised from Rs. 1,662 by Rs. 400, and a decree was given for the enhanced rent of Rs. 2,000. It seems that the pergunnah, or the share of the pergunnah which embraced the villages in question, was sold at a Government sale and purchased by the Government. During the time it was in the hands of the Government there was again a successful suit to enhance the rent, so that, if the case had rested there, the decree in 1821 and this subsequent suit would afford clear evidence that this taluq was not held at a fixed and unvaried rent. It seems that after the decree passed in its favor, the Government parted with the pergunnah, which came again into the family of the plaintiff's ancestors. We find it in the possession of Rajah Horendro Narain Roy, who is the plaintiff in the most important of the former suits, to which reference will now be made.

Rajah Horendro Narain Roy commenced this suit in 1849 against the predecessor of the defendants to enhance the rent, and the defendant in that suit contended that the taluq was not liable to enhancement. He also set up the deed of compromise which had been come to by the widow zemindar in the former suit. After two decrees of the Principal Sudder Ameen adverse to the plaintiff, and two remands on appeal, a decree was passed by the Principal Sudder Ameen on the 13th November 1856, by which it was determined that the taluq was subject to enhancement, and that the deed of compromise was not binding upon the plaintiff; that the lady who made it had only a limited estate, and could not bind her successors. There was an appeal from the decree to the Zillah Judge, who affirmed it; and upon further appeal to the Sudder Dewanny Adawlut, that Court passed a decree on the 25th March 1862, dismissing the appeal, and by that decree the liability of the taluq to enhancement was finally established. There was great delay in making the measurements, in consequence of some dispute apparently about the measuring rod, which, it is stated, lasted for a considerable time. The report of the Ameen was not made until the 26th September 1867. The Ameen appears to have taken evidence and gone minutely into the rates, the various qualities of land, and the values are set out in his report, and he fixes the rent, which was properly payable by the taluqdar, at the sum of Rs. 8,124.

1879

SURUT SOONDARI DEBYA v. PRANGOBIND MOZOOMDAR.

Judgment.

rent which had been claimed in the notice served prior
uit of 1849 was a sum of Rs. 3,200. The Judge of
sing, upon cross-appeals, held that he could give judg-
r the rent recoverable in the suit only at that rate, but
r the future the rent would be payable according to the
und by the Ameen. His decree is to be found at page
the Record, and is of the date of the 20th August 1869.
follows :—

it the cross-appeal be dismissed; that this (plaintiff's
be admitted; that the orders of the lower Court be
l; that the appellant do get in her share of that pro-
he rent of Rs. 3,200 a year, with interest at 12 per
p to the day of payment of the rent of the time prior to
itution of the suit. The appellant shall be entitled to
rent from the 1st Bysack 1276," that is, from 1869,
rate of rent fixed by the Ameen, after deduction of 15
nt., being the judgment-debtor's profit and collection
; that unless barred by some law, the appellant shall be
to recover rent at Rs. 3,200 by means of suits."

Lordships understand this decree to determine that the
was entitled to the rent for one year, which he had
as due prior to the commencement of the suit, at the
Rs. 3,200 a year; that in the interval between the
icement of the suit in 1849 and the decree in 1869, the
as payable at the same rate of Rs. 3,200; and that
869 the rent would be payable at the rates fixed by the
The Judge thought he could not give the intermediate
tween 1849 and 1869 in the present suit, and that the
must sue for that rent in some new proceeding, subject
liability to be barred by limitation, if that bar could be
lly set up. The reason of the Judge for that part of
ee, which relates to the rent from 1869, is thus stated
dgment:—"The judgment-debtor has, by his own act,
this case to drag very slowly along, and when the mea-
and assessment was not made until 1867, or seventeen
en years after the decree, it is but fair that the decree-
ld get the assessment fixed at what is a fair rental
and not be compelled again to leave to the Courts to

1879

SUBUT SOONDARI DEBYA v. PRANGOBIND MOZOOMDAR.

Judgment.

fix the rental at current rates, because he decreed what was a fair rate when this suit was instituted."

The nature of the plaint in the present suit has been already commented upon. It is evidently founded in some measure upon the decree of 1869, though not resting solely upon it, but claiming a right generally to have the rent enhanced. That the defendant, however, was perfectly alive to the importance of the decree of 1869, and of the Ameen's report, upon which it is based, is plain from his answer, which in paragraph 8 he states as follows:—"The plaintiff in the plaint has stated that the amount mentioned by the Ameen in his report in the former case was not the amount of the assets of our mocurarri taluq, but that statement is unfounded. In fact the amount mentioned in the said report of the Ameen is considerably greater than the assets in the mofussil; and indeed the said report of the Ameen was rejected in the former case. Hence this suit for enhancement of rent on the basis of a rejected report is in every respect worthy of dismissal." There seems to be no ground whatever for the allegation that the Ameen's report had been rejected; but the allegation shows that the defendants understood that the plaint was, in a great measure, at least based upon the judgment which was founded upon the Ameen's report.

The course that the proceedings in the present suit took was this: issues were settled, and, without going through them, it may be stated that they were such as would be usually framed in a suit for enhancement of rent. The Subordinate Judge took evidence as to the rates in the neighbouring villages, and several witnesses were examined on both sides with reference to them. It was then prayed (by which side does not very clearly appear) that the lands should be re-measured, it being suggested that there had been changes since the report of the Ameen in the suit of 1849. Accordingly a new measurement was directed, and an order given to an Ameen to proceed with it, having regard to the altered state of the lands and their culturable and rent-paying condition. The order also contained a direction that the Ameen should inquire into the prevailing rates, but pending his inquiry that part of the order was rescinded. The Ameen made his report upon the measurements, finding that there was a much less amount of land

1879

SURUT SOONDARI DEBYA v. PRANGOBIND MOZOOMDAR.

Judgment.

which would bear rent than existed at the time of the report of the former Ameen. The decrease of the culturable land must have been considerable, and after the adjustment of the rates by the Judge to the new measurements, the rent of Rs. 8,124, declared to be the proper rent by the decree of 1869, was reduced by him to Rs. 5,062, and his decree was given for one year's rent at that rate. His decree is :—"That the suit be decreed; that the plaintiff obtain from the defendants Rs. 5,062-15-6, being the rent of her 10 annas share, together with interest from this day to the date of realisation at the rate of 12 per cent. per annum."

The defendants appealed to the High Court, and that Court has given a judgment which passes by the previous litigation and the decree of the 20th August 1869. Having looked at the evidence as to the rates which had been given before the Subordinate Judge, the High Court came to the conclusion that that evidence was wholly insufficient by reason of what they considered its unsatisfactory character, to establish a case for enhanced rent. It does not seem to have been present to the minds of the Judges that the plaintiff was starting upon the foundation of an enhanced rent which had been found so recently as 1869, two or three years before the commencement of this suit, and which established a *primâ facie* case of the rent properly payable by the taluqdar. Their Lordships cannot think, even if the case had been rested altogether on a new enquiry into the prevailing rates, that the Judges of the High Court would have been right in peremptorily dismissing from their consideration the whole of the evidence on the part of the plaintiff as of no weight. The evidence was of that kind which would be naturally given in cases of this description. But in the present suit it was supported by what had been found as the proper rent in 1869.

Their Lordships think that the decree of the High Court cannot stand, and they see no sufficient reason for disturbing that of the Subordinate Judge, which is confined to decreeing in favor of the plaintiff the payment of one year's rent.

In the result, therefore, their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, and in lieu thereof to direct that the decree of the Subordinate Judge be affirmed, and that the appeal of the defendant to the High Court be dismissed with cost. The appellant will have the costs of this appeal.

[CIVIL APPELLATE JURISDICTION.]

1879 *August* 14*th*.

JUMOONAH PERSHAD (PLAINTIFF) . . . APPELLANT;

AND

ZAIBUNNISSA AND OTHERS (DEFENDANTS) . . RESPONDENTS.

Jurisdiction—Cause of action partly outside jurisdiction—Hundis.

The defendant who resided in the district of M, but carried on business through an agent at Calcutta, by a letter dated 4th August 1874, signed by such agent, authorized the plaintiff to advance money to H. K., at M, on hundis drawn there by him upon defendant's firm at Calcutta, the hundis to be accepted and paid at maturity at Calcutta.

Hundis were so drawn and accepted, but the money advanced was not paid at maturity.

In a suit at M against the defendant as drawer or acceptor, it was *held* that the Court at M had no jurisdiction to try the case.

Per BROUGHTON, *J.*—If the letter of 4th August 1874 amounted to a request to the plaintiff in M to pay money at M to be re-paid at Calcutta, no cause of action, upon which a suit would lie against the defendant in the district of M, could arise upon it.

THIS is an appeal from the decision of the Judge of Tirhoot, dated the 27th of March 1878, reversing that of the Subordinate Judge of that district, dated the 23rd December 1876.

The suit was instituted on the 7th of March 1876, to recover a sum of Rs. 4,951-5, principal and interest, upon four hundis, dated respectively the 23rd and 25th of September and the 8th and 9th of November 1874, negotiated by Hossein Ali Khan, the third defendant, and drawn in favor of the plaintiffs Kothi upon the fourth defendants, Mahomed Ekya Khan and Mahomed Zakarya Khan, in whose name the business of the first defendant Mussamut Zaibunnissa was carried on.

It was stated that Zaibunnissa had dealings in hides at Mozufferpore, Calcutta, and other places, carried on in the names of the fourth defendants, her minor sons; that Assad Ali Khan, her husband, the second defendant, conducted her business as her general mokhtar, while Hossein Ali Khan remained at Mozufferpore and transacted her business at the godowns there; that Hossein Ali Khan was in the habit from time to time of taking

1879

JUMOONAH PERSHAD v. ZAIBUNNISSA.

Statement.

money from the plaintiffs by negotiating hundis, which were paid by the second defendant for the first defendant in Calcutta; that the second defendant wrote to the plaintiff on the 4th of August 1874, asking him to receive hundis drawn by Hossein Ali Khan up to the amount of Rs. 10,000, and to pay their value promising acceptance of the hundis on presentation at Calcutta and payment of the money at maturity; that in pursuance of this arrangement Hossein Ali Khan, in order to enable him to carry on the hide business, sold the four hundis drawn on him by the Kothi to the plaintiffs at Mozufferpore and received their value Rs. 4,200; that the plaintiff, in accordance with the practice, sent the hundis to his agent who sent them to the house of business of the first defendant at Calcutta, for acceptance, and that the second defendant there accepted them in the name of the firm. The agent on the due date sent them to the second defendant for realization, but he refused to pay them; that the agent thereupon returned the hundis to the plaintiff, who gave notice to Hossein Ali Khan, the third defendant. Hossein Ali answered the notice, but the first defendant did not, and the money was not paid.

The plaintiff, therefore, sought to make all the four sets of defendants liable—the first for payment of the debt and interest, the second as drawer, the third as acceptor of the hundis, and the fourth as the persons in whose name the business is carried on.

The first defendant denied all connexion with the transaction. She says that she does not carry on the business at Mozufferpore but at Calcutta, and that she has nothing to do with the hundis; that Hossein Ali Khan had no authority from her to draw, nor Hossein Ali Khan to accept, the hundis. She says she is not guardian of the fourth defendants, who are minors, and she denies the receipt of the notice of non-payment. She says that the plaintiff and Hossein Ali Khan have colluded together in order to make her liable, and that the latter is only her tenant carrying on business at Mozufferpore on his own account.

Hossein Ali Khan alleged that he was merely a servant of Hossein Ali Khan, the general manager of the first defendant, and that the transaction was one done on behalf of the business of the

1879

JUMOONAH PERSHAD v. ZAIBUNNISSA.

Statement.

first defendant, and that he personally had nothing to do with it.

Assad Ali Khan alleged that a letter, dated 30th July 1875, written by Hossein Ali Khan in reply to the notice of non-payment, contained a fresh contract to re-pay the money, and that the date of that letter should be held to be the date of the cause of action.

He says that if the acceptance was at Calcutta, the Court in Tirhoot had no jurisdiction; that he has nothing to do with the business at Mozufferpore; that he did not write the letter of the 4th of August 1874, which was put forward by the plaintiff, and which purported to give authority to the plaintiff to advance money to Hossein Khan at Mozufferpore on hundis drawn by him there to be re-paid at Calcutta by the firm of Mahomed Ekya Khan and Mahomed Zakarya Khan, and that Hossein Ali Khan's letter gave no cause of action against him, Assad Ali Khan. That the hide business at Mozufferpore was the business of Hossein Ali Khan, and not of the other defendants.

He adds that the first defendant and her minor sons have nothing to do with the Calcutta business, which is his own, and that he acted merely as a commission agent for Hossein Ali for the sale of his hides. He also states that Hossein Ali Khan is colluding with the plaintiff.

The issues framed by the Subordinate Judge were as follows:—

(1.) Whether or not this suit is maintainable in the Court at Mozufferpore againsta ll the defendants? (2.) Whether or not the letter of the 4th of August 1874 is true? (3.) Whether the first defendant Zaibunnissa, as guardian of her minor sons, carried on business in the Mozufferpore district in her sons' name, and negociated the hundis herself or through her servants? (4.) Whether Assad Ali, the second defendant, had power to accept hundis drawn by Hossein Ali, the third defendant, and whether Hossein Ali had any authority to draw them on the minors, behalf? (5.) Was Hossein Ali authorized by Assad Ali to draw money by negociating hundis from the plaintiff? (6.) Did Hossein Ali, on receipt of notice of dishonor of the hundis, agree to pay back the money drawn by him? (7.) Which of the defendants, if any, are liable, and what is the amount due to the plaintiff?

1879

JUMOONAH PERSHAD v. ZAIBUNNISSA.

Statement.

The Subordinate Judge decided that Assad Ali could not be d in his Court, and struck his name out of the case, and having e so, he stated that the issues between the parties had been re- d to one, namely, whether Zaibunnissa was liable or not, or in r words, whether she had carried on hide dealings in that dis- (Tirhoot) for her own benefit through the agency of Hossein Khan, a brother of her husband, and he found this issue nst her, and gave a decree against her alone.

om this decision Zaibunnissa appealed to the Judge of Tir- . Her grounds of appeal were—first, that the Court had no diction; second, that certain issues had not been fixed or tried. was admitted by the advocates of both parties in this second al that this question was not material) and other grounds ted to the evidence in the case.

e learned Judge held that the lower Court had jurisdiction as hundis were made and sold, and the consideration passed at afferpore, and that the cause of action arose there in conse- ce of non-payment at Mozufferpore after notice of dishonor at that place.

e learned Judge was also of opinion that the plaintiff had out that Zaibunnissa was the real owner of the Calcutta ess, carried on under the name of Mahomed Ekya and Za- Khan through her husband and agent Assad Ali, and also r of the Mozufferpore hide godowns, and that Hossein Ali er general agent at that place; but he thought that there was oof that the hide business was carried on for her by Hossein at Mozufferpore in 1874, and that he had no authority from o draw the hundis. He was of opinion that Assad Ali did by writing the letter of the 4th of August 1874, in any way Zaibunnissa.

the result, the learned Judge found that Hossein Ali carried he Mozufferpore business on his own account, and drew ndis on his own account; he released Zaibunnissa from y, and made a decree against Hossein Ali personally e for the full amount claimed by the plaintiff, interest

this decision the plaintiff appealed, contending that on found Zaibunnissa is liable.

1879

JUMOONAH PERSHAD v. ZAIBUNNISSA.

Baboo *Mohesh Chunder Chowdhry*, for the Appellants.

Mr. *R. E. Twidale*, Mr. *M. L. Sandel*, and Baboo *Nogendronath Roy*, for the Respondents.

Judgment.

The following judgment of the Court (1) was delivered by

BROUGHTON, *J.*

BROUGHTON, *J.*, (who, after stating the facts, proceeded as follows):—

It is now contended that if Zaibunnissa, the first defendant, is not liable upon the hundis she is liable for the debt, the money having been paid to Hossein Ali at her request made by Assad Ali in his letter of the 4th of August 1874, which runs as follows:—

"Baboo *Jamna Pershad Saheb*, Baboo *Saheb*, the fountain of great benevolence and generosity. May his kindness be on the increase!

"After respectful compliments and desire for an interview with you, which is full of pleasure, I beg to represent that on receipt of advice of sale of hundis, dated respectively the 2nd and 4th Jamadeal Sam, for Rs. 1,200 (twelve hundred each), drawn by Hossein Ali Khan, Saheb of Mozufferpore, upon Mahommed Akya Khan and Mahommed Zakarya, Khan Sahebs of Calcutta, you were written to pay the value of the said hundis to Hossein Ali, Khan Saheb, and to send down the hundis to Calcutta, which would, on their arrival, be accepted, and their value paid on the expiration of their term. But although to-day is the 20th day of the month of Jamadeal Sam, the said hundis have not as yet come for acceptance. Hossein Ali, Khan Saheb, writes in every letter to say he has not yet received the money, and that he will write when received. Hossein Ali, Khan Saheb, abovenamed has not, however, yet written to say that he has received the money. I do not know if you have paid him the money or not. The good result of receipt of money immediately upon sale of hundis is, that goods are purchased therewith, and if there is delay in receiving money, it interferes with purchase of goods. If you have paid the money, well and good; if not please pay it down. For if any money is received after a long time how can goods be purchased? You should

(1) AINSLIE and BROUGHTON, *J.J.*

1879

JUMOONAH PERSHAD v. ZAIBUNNISSA.

Judgment.

BROUGHTON, *J.*

ıave any apprehension and hesitation of any kind in receiv- hundis drawn by Hossein Ali, Khan Saheb, upon Mahom- Zakarya, Khan Saheb, aforesaid, and in paying the money :ed by it. You can take hundis to the amount of Rs. 10,000 thous and,) drawn by the said Khan Saheb, and (? pay the ɔ of the same) [*torn*]."

On their arrival they shall be accepted and their value paid the expiration of the term. Rest assured in every way, and this letter as a security or assurance. All well here. ı, Salutations to you."

Yours obediently,
ASSAD ALI KHAN,
Calcutta.

ated the 4th August.

P.S.—After writing this letter, I have accepted two hun- taken (literally kept) by you, one dated the 2nd Jamadeal , No. 1, in favor of Radha Kishen Ramdyal, for Rs. 1,200; the other, dated the 4th Jamadeal Sam, No. 2, in favor of l Chand, Duchun Dass, for Rs. 1,200, represented for your mation."

ıe superscription was as follows :—

"BABOO SAHEB, BABOO JUMNA PERSHAD SAHEB, foun- of great benevolence and generosity. May his kindness be ıe increase!

Care of BABOO LALJEE SAHOO, JAMNA PERSHAD SAHEB, at Cooty at Mozufferpore."

is was an authority from the defendant Zaibunnissa, through ent at Calcutta, to the plaintiffs to advance money on their at Mozufferpore to Hossein Ali, to be repaid at Calcutta maturity of the hundis which were to be accepted there. would be no objection to treating the case as one for money paid by the plaintiff for the defendant at his request. nothing in this case to show that such a mode of treating in any way prejudice the defendants in their defence, ase of *Joan Mull* vs. *Munoo Loll*, 1 M. Jn. N. S., 219, is rity for the adoption of such a course.

1879

JUMOONAH PERSHAD v. ZAIBUNNISSA.

Judgment.

BROUGHTON, J.

The case may, therefore, be treated either as a suit by the p against the drawer or acceptor, or against both, or as a su money lent or paid at the request of the defendant; but in w ever way it may be treated, the whole cause of action di arise within the jurisdiction of the Court at Mozufferpore.

The money was advanced at Mozufferpore, and the h were drawn there, but they were accepted at Calcutta, and made payable, so that the non-payment, which is the breach o contract, took place not at Mozufferpore but at Calcutta.

If, therefore, the words "cause of action" must be interp to mean the whole cause of action involving the contract and breach, the Court at Mozufferpore is not a Court in the di of which the cause of action arose, and under this he jurisdiction the suit cannot be maintained in that Court.

Again, if the breach alone constituted the cause of action suit would not lie. It is only in the case of the advance o money having taken place at Mozufferpore being consider the cause of action, that the Court there could have jurisdi to try the case.

The meaning of the words "cause of action" has been sidered in very many instances, and with reference to diff cases, circumstances arising either out of applications to ch the venue of actions brought in the superior Courts in En in cases arising upon the County Courts Acts and upo Common Law Procedure Act in England, and in India, in arising upon the Bengal Regulation II of 1803, section 5 Code of Civil Procedure, Act VIII of 1859, section 5, the L tation Act XIV of 1859, sections 1, 11 and 12, and upon c 12 of the Charters of the High Courts.

It has been pointed out by POLLOCK, C.B., in *Fife* vs. *B* 6 W. R., 282, that the same construction cannot alwa put upon these words. In that case the learned Chief J held that they could not be construed in the same way used in the common Law Procedure Act, and when used County Courts Act.

Again, the case of an application to change the venue to contain elements which are quite foreign to a case arisi the modern Indian enactments. The venue was laid in

ounty for the purpose of the trial of the case in that by a jury from the vicinage who were supposed to be icquainted with the facts. Instances are given (Reeve's f the English Law, Vol. III., clause 16, p. 111) in the of Edward III, of an award of two venues, and a jury ned from both counties tried the case. The Statute 6, l II, clause 2, directed that "writs of debt and account l others, such actions should be directed to the Sheriffs counties where the contracts of such actions did arise," ise the writ abated.

cases upon the County Courts Act, rather than the Common rocedure Act, have in several instances in this country been be analogous to cases arising upon the Code of Civil Pro- —*Feda Hossein* vs. *Syedoonnissa*, 1 M. Jn., N. S., 80; *Mull* vs. *Munoo Loll*, *ib.*, 219; *Mulchand Joharimal* vs. *and Shivdas*, I. L. R., 1 Bom., 23; so that the case *han* vs. *Weldon*, L. R., 10 C. P., 47, which was decided application to issue a writ out of the jurisdiction of the r Courts in England under section 18 of the Common rocedure Act, 1852, does not necessarily furnish a guide to ermination of the question in the present instance. In se the learned Judges of the Courts of Common Law at inster differed in opinion, the Court of Queen's Bench one view and the Court of Common Pleas another, the f Exchequer being divided in opinion, and it was arranged, sake of uniformity, to adopt the decision of the Court of n Pleas in the case of *Jackson* vs. *Spittall*, L. R. 5 C. P., ere it was held that it was not necessary to show that ole cause of action arose within the jurisdiction.

case of *Luchmee Chund* vs. *Zorawur Mull*, 8 M. I. A., s, on the other hand, decided by the Judicial Committee Privy Council upon the construction of Regulation 11 , section 15, containing the same words as section 5 of Act 1859, the Code in force when this suit was instituted.

CHELMSFORD, who delivered the judgment of the Judicial ee, commenced by saying:—"The only question which dships have to determine is, whether the contract which d into between the parties, or the cause of action

1879

JUMOONAH PERSHAD v. ZAIBUNNISSA.

Judgment.

BROUGHTON, *J.*

arising out of that contract, occurred within the jurisdiction the Zillah Court at Agra," drawing a distinction between th contract and the cause of action which is incompatible with th notion that the contract itself must in that particular instanc be considered the cause of action for the purpose of givin jurisdiction. Finding then that the contract to establish a part nership was to be carried on at Muttra within the jurisdiction, it was held that the Court at Muttra could entertain a suit for the balance due on the partnership account.

This case has been treated by Mr. Justice HOLLOWAY as an authority for holding that the making of the contract is not a part of the cause of action—*Pallaravy Mudali* vs. *Audimula Mudali*, 5 Mad. H. C. Rep., 420; but in this opinion the Court at Bombay did not concur, and considered that it was only in the particular case that it could be taken as decided that the contract was no part of the cause of action, the suit being in the nature of an action on accounts stated within the jurisdiction or for an account of a partnership which was carried on within its jurisdiction. The first charter of the High Courts published in 1862 gives those Courts original jurisdiction in cases, among others, where the cause of action arose, using the same words as those used in the 5th section of the Code of Civil Procedure. But in 1865, when the amended charter was published, its language was altered and jurisdiction was given, "if the cause of action shall have arisen either wholly, or in case the leave of the Court shall have been first obtained, in part within the local limits &c." From this, I think, he inferred that the words "cause of action," as used in the earlier charter and in section 5 of the Code means the "whole cause of action," and whether these words include the contract or not, they must include the breach, for without the breach there would be no action.

In *Hills* vs. *Clark*, 14 B. L. R., 367, the payment was to be made in the district of M; and, although the contract was made in another district where also the delivery of the Indigo, the subject of the contract, took place, it was held that the suit could be maintained in the district of M.

In the case of *Goopi Krishna Gossami* vs. *Nilcomul* [illegible] 13 B. L. R., 461, MARKBY, *J.*, held that a suit was cogni[illegible]

1879

JUMOONAH PERSHAD v. ZAIBUNNISSA.

Judgment.

BROUGHTON, J.

the Court of the place where the contract was made, or of the place where it was to be performed.

But he also thought that the contract was to be performed in the same place, and it was upon this ground that BIRCH, J., agreed in upholding the jurisdiction of the Court below.

But in the present case, on the finding of the Court below on the facts, Mussamut Zaibunnissa did not carry on business in Tirhoot, either personally or through an agent, and therefore there was no contract or dealing with her in Tirhoot upon the hundis.

Under these circumstances, we are of opinion that the Judge of Tirhoot had no jurisdiction to try this case against Mussamut Zaibunnissa, charging her as drawer or acceptor of the hundis.

The letter of the 4th of August 1874, if it amounted to a request to the plaintiff in Tirhoot to pay money to Hossein Ali at Mozufferpore in Tirhoot to be repaid at Calcutta did not, we think, on the authorities to which we have referred, constitute a cause of action upon which a suit would lie against her in that district.

It appears to us that the appeals 1429, 1481, 1430, 1431, 1432 and 1433 must be governed by this case, and that the appeals should all be dismissed with costs.

AINSLIE, J. AINSLIE, J.:—

I am of the same opinion.

[CIVIL APPELLATE JURISDICTION.]

1879
Sept. 11*th*.

No. 570 of 1879.

KAWA MANJI AND OTHERS (DEFENDANTS) . . APPELLANTS;

AND

KHOWAZ NUSSIO (PLAINTIFF) . . . . . RESPONDENT.

Possession, Suit for—Title, Primâ facie evidence of—Possessory Suits—Evidence Act, section 110*—Specific Relief Act I, of* 1877, *section* 9.

In a suit for possession, where the plaintiff proved that he had been in possession of the lands in dispute, that he had been ousted by the defendants, who were unable to give any proof of their right so to oust him, or of a superior title, *held* (PEINSEP, *J.*, dissentiente) that the prior possession of the plaintiff was *primâ facie* evidence of title, and that he was entitled to a decree.

Per PEINSEP, *J.*:—Proof of prior possession and of illegal dispossession are in themselves no evidence of title except in a possessory suit under the Specific Relief Act, (I of 1877). * * * Section 110 of the Evidence Act applies only to actual and present possession, and does not declare generally that possession shall always be *primâ facie* evidence of title.

APPEAL from a decision passed by the Officiating Judge of Rungpore, reversing the decree of the Moonsiff of Olipoor.

The plaintiff in this case sued to recover possession of certain lands which he had obtained upon a partition made between himself and his brother. He alleged that for some time after the partition he had been in possession of his own share, but that subsequently he had been forcibly dispossessed by the defendants or some of them.

In the Moonsiff's Court three witnesses, who were examined by the plaintiff, stated that the disputed land was in the possession of the plaintiff before, and up to the time of the dispossession alleged by him. The plaintiff, however, failed to prove that he had held possession on the strength of any title. The only documents produced were certain dakhilas which he was unable to attest or prove by any witness. Under these circumstances the Moonsiff dismissed the suit.

On appeal, however, the District Judge was of opinion that having been proved that the plaintiff had been in possession

1879

KAWA MANJI v. KHOWAS NUSSIO.

Judgment.

the disputed land before the alleged dispossession, and that it was the defendants who had dispossessed the plaintiff, the burden of proving title lay in the first instance upon the defendants.

Evidence not having been adduced on their behalf, a decree for possession of the land was granted to the plaintiff.

The defendants thereupon preferred this second appeal, on the ground that the District Judge was wrong in throwing the onus of proving title upon them.

Baboo *Johur Chunder Chuckerbutty*, for the Appellants.

Baboo *Nullit Chunder Sen*, for the Respondent.

The following judgments were delivered by the High Court (1):—

MORRIS, *J.*:— MORRIS, *J.*

This was a suit to recover possession of land after declaration of title. The objection pressed before us by the defendants, appellants, is that contained in the first of their written grounds of special appeal. It runs in these words:—"For that the learned Judge is in error in throwing the onus of proof upon your petitioners, the defendants in the cause. Plaintiff having sued for recovery of possession and establishment of title, it was incumbent on him to prove his title before he could obtain a decree in the suit."

It appears, however, from the judgment of the lower Appellate Court that the plaintiff proved that he was in possession of the land in suit; that he was ousted from it by the defendants; and that the defendants were unable to give any proof of their right to oust him, or of their superior title to the land. The lower Court, therefore, considering that the plaintiff's previous undisputed possession was in itself evidence of title, and that this evidence had not been rebutted in any degree by the defendants, gave a decree in favour of the plaintiff. I am unable to say that the lower Court has thereby committed any error in law. On the contrary, there are numerous decisions which go to show that possession affords *primâ facie* evidence of title, and that such

(1) MORRIS and PRINSEP, *J.J.*

1879

KAWA MANJI v. KHOWAZ NUSSIO.

Judgment.

possession cannot be disturbed unless the party so disturb it can show a better title. The defendants, in this case, h disturbed the undoubted possession of the plaintiff, and h been unable to place themselves in any higher position than t of mere wrong-doers or trespassers. The special remedy p vided by section 9 of the Specific Relief Act, does not, in opinion, affect or alter the law on this point. In this view, the fore, the plaintiff was, in my opinion, entitled to a decree. Acco ingly, as the opinion of the senior Judge must prevail, the or in this case is, that the appeal be dismissed with costs.

PRINSEP, *J.* PRINSEP, *J.* :—

The plaintiff has brought this suit for possession of certain la of which he states that he has been dispossessed by defenda 1, 2, and 3, in collusion with defendant No. 4, his zemindar.

The Moonsiff observes that "the witnesses examined by plaintiff have stated that the disputed land was in the possess of the plaintiff before the time of dispossession alleged by th But the plaintiff has not been able to prove that he held possess on the strength of any right. The Malik Zemindar, defend No. 4, denies having let out the disputed land to the plainti Hence, in the Moonsiff's opinion, "as the plaintiff has failed establish his right, he is not entitled to get a decree for recover possession of the land by declaration of right, and for gett the house enjoyed by the defendant pulled down or to oust parties in possession." The suit was accordingly dismissed.

In appeal, the District Judge considered that "the Moon has thrown the burden of proof on the wrong party. The pl tiff has proved by three witnesses, and the Moonsiff admits the plaintiff was in possession of the disputed land. The defend deny this, but as the fact has been established, and as it has been shewn that defendants 1, 2, and 3 have dispossessed the pla by force, the burden of proving title lies on them in the instance. But they have not given any such proof." Judge on these grounds set aside the order of the first and gave plaintiff a decree.

In special appeal, it is contended that the Judge has erron thrown the burden of proof upon the defendant, in

1879

KAWA MANJI v. KHOWAZ NUSSIO.

Judgment.

PRINSEP, *J.*

laintiff, having sued for recovery of possession and establishment f title, it was incumbent on him to prove his title before he ould get a decree.

It appears to me that the law has provided for two distinct kinds of suits for recovery of land :—(1), under section 9 of the Specific Relief Act, 1877, which has re-enacted section 15, Act XIV of 1859, by a simple possessory suit; (2), by a suit for possession by establishment of title.

By the first kind of suit, a speedy and summary remedy is provided for the recovery of possession by one who has been sted without due recourse to law, that is, who was been unlawfully or forcibly dispossessed, and on proving such dispossession ithin six months from the date of the institution of his suit, he ill be restored to possession notwithstanding any other title at may be set up in such suit. No appeal or review of judgment is allowed in such a suit, but it is declared that nothing all bar any person from suing to establish his title to such operty and to recover possession thereof. By having recourse such a suit, a party who has been so dispossessed by other, can obtain immediate relief, and can be placed in the e position as he formerly was with reference to those who k to question his title. He thus obtains all the advantages being a defendant (see *Kunhi Komapen Kurupu* vs. *Changara ngarachan K. C., Ambu*, 2 Mad. H. C. R., 313, per HOLLOWAY INNES, *J.J.*), and of having the presumption in favour of having a good title which section 110 of the Indian Evidence expressly gives to one who is in possession of the land. if he neglects to bring such a suit, he loses those advantages, ich pass to his adversary) should he bring a suit to recover ession by proving his title.

e second kind of suit is to recover possession by proving a to the land and one superior to that shown by the defen-. In order to establish his right to bring such a suit, the tiff must first prove that he, or one from whom he derives itle, was in possession of the land within twelve years from te of its institution, and he must then prove his title to the Until he does this, the presumption of title is with the lants, who admittedly are in possession at the time of the

1879

KAWA MANJI v. KHOWAZ NUSSIO.

Judgment.

PRINSEP, J.

institution of the suit. In a suit for possession on proof of title, the law gives no presumption in consequence of his previous possession, unless it has been so long and continuous that a good title may be reasonably presumed from it. Unless this be so, I cannot understand the object of section 9 of the Specific Relief Act, and the special and short limitation allowed to possessory suits thereunder. Section 110 of the Evidence Act, in my opinion, applies only to actual and present possession, and does not declare generally that possession shall always be *primâ facie* evidence of title.

Such is the opinion that I have formed after much careful consideration of the law and the reported cases on the subject. My attention has been especially directed to the two cases reported in 8 W. R., 387, and 10 W. R., 102. *Khajah Enaetoolla Chowdhry* vs. *Kishen Soondur Surma* and *Dabjee Sahoo* v. *Shaikh Tumeezooddeen*. These cases, I remark, were decided before the Indian Evidence Act of 1872 was passed. The objection I have to the rule laid down in these cases is, that the defendants, as in the case now before us in special appeal, are considered to be wrong-doers and trespassers, because the plaintiffs proved that they had been in possession until illegally ousted by defendants, who could show no title either to oust the plaintiffs or to hold the land as rightful owners. But it appears to me that, having admittedly been in possession for more than twelve months, the right to bring a suit against them for trespass has become barred, and that whatever may have been the means resorted to for obtaining possession, they are in the position of persons in possession who are entitled to hold the land as owners with a good title until a better title be established as against them, when they will be required themselves to prove their own title. The principles under which actions for ejectment are tried in England are more suited to possessory suits under section 9 of the Specific Relief Act than to suits for possession of land on proof of title; and I believe that this form of action no longer exists in England since the passing of the Judicature Act. Proofs of prior possession and of illegal dispossession are in themselves no evidence of title except in a possessory suit.

The views that I have expressed are those of the Judges

the Bombay High Court in the case of *Dadabhai Narsidas* vs. *Sub-Collector of Surat*, 7 Bombay H. C. R., 82, Appellate Civil Jurisdiction. In p. 84 the distinction between the law of England and of India is thus pointed out :—" I am of opinion that the latter law (*i.e. of India*) requires that in action for ejectment we should always enforce the ordinary rule that a plaintiff should always recover by the strength of his own legal title. My reason for this is, that the law of this country gives to a person who is dispossessed of property, a remedy which the law of England does not provide; and that, if he does not choose to avail himself of this remedy, he has no claim to the advantages which it would have secured to him." The learned Judge then proceeds to compare Indian with Roman Law as regards possessory suits and an interdiction *per vim*, and points out that under the latter, if a person has allowed one year to elapse without claiming this remedy, he was considered to have lost his possession; though he retained his action for the property he was bound in such action to make out his title, adding "under a similar law, we should, I think, apply the same principles. The law has fixed a period of limitation within which a party may recover possession without proof of title; if he allows that period to elapse he must prove his litle."

This was followed by WESTROPP, *C.J.*, and LLOYD, *J.*, in the case of *Lakshmibai* vs. *Vithal Ramchundra*, 9 Bom. H. C. R., 1. The Chief Justice, in noticing the difference between a possessory suit and a suit for possession on proof of title, remarks :—

"In that suit, brought as it was more than six months after dispossession, he was bound to show his title, and has shewn a good title as mortgagee, and he was further bound to show a cause of action within twelve years, and he has done so, viz., his ouster from possession within twelve years before suit brought. If he had brought a summary suit within six months after dispossession, he might have done so on easier terms, viz., by merely showing dispossession within that period." From this I gather that in the Chief Justice's opinion it would not have been sufficient without proof of title merely to prove possession before the

1873

KAWA MANJI v. KHOWAZ NUSSIO.

Judgment.

PRINSEP, *J.*

It seems to me that because a person has taken the law into his own hands and deprived another of possession of land, he cannot be termed a trespasser except in a possessory suit or by one who proves his title, and that title by something more than by anterior possession.

In the present suit we are told that the dispossession took place only three months before its institution. But plaintiff has not chosen to bring a possessory suit; he has sued to recover possession by proof of his own title, and foregone advantages which he might otherwise have obtained in return for which he has been able to have his dispute determined in one suit with the full right of appeal. It is of importance to notice this because the plaintiff failed in the first Court, and if this had been a possessory suit, it could have gone no further. Plaintiff therefore, cannot claim the advantages of such a suit in a Court of appeal.

In my opinion, therefore, the order of the lower Appellate Court should be set aside, and the order of the Moonsiff restored.

[ORIGINAL CIVIL JURISDICTION.]

KOOMUL CHUNDER DASS . . . . . PLAINTIFF;

AND

CHUNDER KANT MOOKERJEE AND ANOTHER.. DEFENDANTS.

Specific Relief Act (I of 1877), section 21—Arbitration, Agreement to refer to—Bar to Suit.

Before section 21 of the Specific Relief Act can be relied on as a bar to a suit upon a contract containing a stipulation that matters in dispute arising out of the contract shall be referred to arbitration, it must be shown that the plaintiff has refused to refer to arbitration.

The filing of a suit is not such a refusal.

A SUIT was brought to recover from the defendants the sum of Rs. 3,824-5-3, as damages sustained by the plaintiff through the defendants' breach of contract in refusing to take delivery of 5,000 maunds of loose Madanpore Dowra Jute sold to them

the plaintiff. The contract contained a clause providing as follows:—

"Any dispute arising hereafter to be settled by the selling broker, whose decision shall be final."

The plaintiff alleged that he was ready and willing to fulfil his part of the contract, and declared that the defendants had wrongfully refused to take delivery, and were therefore liable to pay the loss which he had sustained by re-selling the goods after notice to the defendants.

The defendants raised two defences. The first was based upon the provision in the concluding paragraph of section 21 of the Specific Relief Act, which runs as follows:—

"And save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced; but if any person, who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

The defendants contended that the plaintiff was, under the above section, barred from bringing his suit, inasmuch as he was bound by the proviso in the contract to refer the matter in difference, which was a dispute arising after the making of the contract, to the final decision of the selling broker.

The defendants also denied that plaintiff was ready and willing to fulfil his part of the contract, and alleged that the goods tendered for delivery were not such as the defendants were bound to take under the contract, the jute tendered being more or less wet, and containing a large quantity of rejections.

Branson and *Hill*, for the Plaintiff.

Phillips and *Bonnerjee*, for the Defendants.

Branson submitted that the bar to the suit, suggested by the defendants, was no bar at all, inasmuch as the defendants did not allege or suggest that they had called upon the plaintiff to refer the matter to the final decision of the selling broker, or that the plaintiff had, having been so called upon, refused to carry out his part of the contract. He further pointed to the words "has refused to perform it," which he said were put into

1879

KOOMUL CHUNDER DASS v. CHUNDER NATH MOOKERJEE.

Judgment.

the Specific Relief Act in consequence of the case of *Koeglar* v. *The Coringa Oil Company, Limited*, I. L. R., 1 Cal., 42, and on appeal *ib.*, 466, in which the plaintiff having called upon the defendant to refer the matter in difference to arbitration, the defendant refused to do so, and when the plaintiff thereupon sued, the defendant pleaded the provision of section 28 of the Indian Contract Act in bar of the suit.

Phillips, for the defendants, contended that the plea in bar was a good plea. The plaintiff, by bringing his suit, had refused to perform the contract. A distinct call from the defendants to the plaintiff to refer to arbitration was not necessary, and he submitted that if such a call was necessary, the written statement of the defendants sufficiently contained the call.

[WILSON, *J.*—But the plaintiff told the defendants in his letters that he was going to sell the goods. Surely if they wished him to go to arbitration they should have called upon him then to do so.]

Phillips.—I submit that such a call before suit is not necessary, otherwise, when a defendant under a contract like the present, refuses to take delivery, the plaintiff may, by at once rushing into Court, prevent the defendant from calling upon him before suit to go to arbitration.

WILSON, *J.* WILSON, *J.*:—

I will not trouble you, Mr. Branson. I think Mr. Phillips is right in saying that this is a contract to refer to arbitration, and that he is right in saying that the present suit is brought in respect of the subject-matter which the parties had agreed to refer to arbitration. But I think that before section 21 in the Specific Relief Act can be relied upon, it must be shown that the plaintiff had refused to refer to arbitration. I do not think that the filing of the plaint is such a refusal. I therefore hold that nothing has been shown under the section to bar the present suit.

[CRIMINAL REFERENCE.]

ARAK NARAIN SINGH . . . . . 1879 June 16th.

AND

UCHMI BUX ROY . . . . . No 252 of 1879

Criminal Procedure Code (Act X of 1872) section 530—Constructive Possession—Possession through ticcadars.

Section 530 of the Code of Criminal Procedure contemplates disputes between owners as well as occupiers.

Per JACKSON, *J.*:—Where a zemindar has let his lands in farm, he, his farmers, and the occupying ryots, are all, in their degree, concerned in any dispute as to possession which may arise, and they ought to be maintained in possession of the interests which they severally enjoy.

Sutherland vs. *Crowdy*, 18 W. R., 11, cited. *Empress* vs. *Thakoor Doyal Singh*, I. L. R., 3, Cal., 320, commented upon as having gone too far.

HIS was a reference under section 296 of the Criminal rocedure Code (Act X of 1872), submitted by the Officiating udicial Commissioner of Chota Nagpore under the following rcumstances :—

Rival claims had been preferred by two persons, Harak Narain gh and Luchmi Bux Roy, to certain land, and the Assistant mmissioner considered it necessary to institute proceedings der section 530 of the Criminal Procedure Code. In these proedings he examined 4 out of 23 witnesses produced by Harak rain, but they failed to prove that person's possession, and upon their evidence, which did not prove the adversary's ssion, and the written statement of Luchmi Bux, he passed rder declaring the latter entitled to retain possession of the until ousted by due course of law.

he High Court quashed this order, on the ground that it had been based on evidence taken before the Judicial Commisr, but upon an unverified written statement.

he Assistant Commissioner thereupon took further evidence, pon that evidence confirmed Luchmi Bux in possession.

1879

HARAK NARAIN SINGH v. LUCHMI BUX ROY.

Judgment.

It appeared, however, that Luchmi Bux had claimed to hold not directly, but through a ticcadar.

The Judicial Commissioner, being of opinion that constructive possession was not such as was contemplated by section 530 of the Code of Criminal Procedure, referred the matter for the opinion of the High Court.

He suggested, however, that no further proceedings should be taken, as it was then nearly a year since the dispute commenced, and no breach of the peace had occurred, or now seemed likely to occur.

The following judgments were delivered by the Court (1):—

JACKSON, *J.* JACKSON, *J.*:—

The Magistrate having made a second order in this matter, after the quashing of the first, the Judicial Commissioner again submits the case to this Court on the objection now taken for the first time that Luchmi Bux, the party in whose favor the order has been made, claims to hold possession, not by immediate collection of rents from the ryots, but through a ticcadar.

My brother MCDONELL thinks this objection is taken too late, and may on that account be disregarded, but it seems to me that the objection, if it be valid, goes, as the Judicial Commissioner says, to the root of the Magistrate's jurisdiction, and must prevail.

I am not aware of any ground for the opinion that a zemindar, who has let a part of his estate in ticca, cannot be regarded as in possession, or be maintained in possession by a Magistrate, as long as section 530, Code of Criminal Procedure, or any like provision, continues in force.

The section in question re-enacts section 2, Act IV of 1840, which was passed for the purpose of settling doubts as to the meaning of Regulation XV of 1824, and that enactment made a change in the law as it stood under the older Regulation XLIX of 1793.

Mr. Justice PHEAR was of opinion at one time that section 530 was applicable only to cases of actual or manual possession, such

(1) JACKSON and MCDONELL, *J.J.*

as that of ryots, but the fallacy of this view was pointed out by Chief Justice COUCH in a later case (*Sutherland* vs. *Crowdy*, 18 W. R., 11), and it may be said to be settled law, that the section contemplates disputes between owners as well as occupiers of land. This, indeed, is perfectly clear when previous legislation is referred to.

The Regulation of 1793 recites the danger to the public peace arising from landholders asserting by the strong hand their claims to the possession of land, and prescribes a form of summary resort to the Dewany Adawlut or Civil Court, and Regulation XV of 1824, dealing with a greater urgency, transfers the cognizance of such matters to the Fouzdary Adawlut, *i.e.*, the Magistrate, and the jurisdiction is continued by Act IV of 1840, which similarly directs the Magistrate to call before him all persons concerned in the dispute (whether proprietors, dependent talookdars, farmers, ryots, or other persons), who are to "give in a written statement of their respective claims as respects the fact of actual possession," the word "actual" being here used in contradiction to the right to possession.

In section 530 the same language is used, except that the enumeration is omitted. From this we are not to infer any change of meaning, but merely to note a change in the mode of drafting, as to which it is not necessary that any opinion should be here expressed. (The change, however, dates from the Code of 1861.)

It is clear to me that when a zemindar has let his lands or a portion of them in farm, he, his farmers, and the occupying ryots are all, in their degree, concerned in any dispute as to possession which may arise, and that they may, and ought to be, effectively maintained in possession of the interests which they actually enjoy.

If this be not so, the following result might occur:—The owner of an estate, A, might have a dispute with the owner of another estate, B, relating to land bordering on both. A, however, would obtain possession through a farmer, and B direct possession. B, if left in possession, might obtain an order from the Magistrate; A would not.

It may be said, however, that A's farmer might be a party to

1879

HARAK NARAIN SINGH v. LUCHMI BUX ROY.

Judgment.

JACKSON, J.

the proceedings, and might be maintained in possession, and therefore A would not be prejudiced. But suppose that the farmer colluded with B, he might fail to prosecute his claims, and B would succeed.

For these reasons I would disallow the objection. My brother McDONELL was, it appears, a party to a decision in which a different view was taken, but whether the view then stated be that which he would now support or not, he thinks the objection taken too late to be listened to in the present case. With the foregoing expression of my own opinion, I am willing to concur in an order refusing interference.

McDONELL, J. McDONELL, J.:—

In my opinion the objection now taken to the Assistant Commissioner's decision is one which should not be entertained at this late stage of the proceedings. It should have been taken, if not before the Assistant Commissioner on the first trial, at any rate before this Court, when the case was referred to it, now nearly a year ago, and not after the case has been twice tried by the Assistant Commissioner. I would therefore decline to interfere with the orders now passed by the Assistant Commissioner. With regard to the objection on its merits, the case of *Empress* vs. *Thakoor Dyal Singh*, I. L. R., 3 Cal., 320, I feel bound to say I now think, goes too far, in that it excludes those who are identical in interest with their sub-tenant, whereas a dispute in regard to the right to the rent may undoubtedly in certain cases, as for instance, when the system of payment in kind prevails, involve a dispute regarding crops and other produce of land between rent receivers which would come under section 530, as in this case the produce itself goes to the rent receiver, and he is as much in actual possession as the cultivator; so in respect of water and fisheries, all the persons interested, landlord as well as tenant, are jointly in actual possession, and a stranger cannot interfere with them without taking away a part of the subject-matter over which their proprietary right is to be exercised. In the case of boundary lands, again, when there is a question whether a certain piece of land is occupied by the owner and under-tenant of one

tate, or by those of the conterminous estate, there is a sufficient mmunity of interest, but when the question is not whether A id his tenant B, or C and his tenant D, but whether B the mant in possession is to pay his rents, being money rents, to A r C, I have doubts whether a Magistrate could interfere under ction 530, and I feel convinced that in the great majority of ses a Magistrate would act far more wisely if he did not attempt interfere, even if the law empowers him to act under this tion. The intermeddling of Magistrates in such cases under lour of section 530 is not, in my opinion, conducive to the ace of the country. Disputes tending to a breach of the peace e fomented by an improper application of the powers given by is section. Each party speculating on the chance of securing Magistrate's award in the first instance, and the advantage the position of defendant in the Civil Court. If, instead of g this section, punishment was rigorously dealt out to those expose themselves to it, we should hear of fewer riots arising of disputes about rent, whether between landlord and tenant, between two rival zemindars.

1879

HARAK NARAIN SINGH v. LUCHMI BUX ROY.

Judgment.

McDONELL, J.

[CIVIL APPELLATE JURISDICTION.]

Nov. 17th.

No. 218 of 1878.

EOTUHUL RAM AND ANOTHER (PLAINTIFFS) . APPELLANTS;

AND

M NARAIN SINGH (DEFENDANT) . . . . RESPONDENT.

Gift, Construction of Deed of—Succession.

A, a Hindu, executed a deed of gift of certain villages in favour of his wife in the following terms:—"The undermentioned villages have been granted as a gift to the Maharani for her necessary deohri expenses." The wife died a childless widow.

Held, that the gift from her husband was for life only, and that the villages in question were not liable in the hands of her husband's heirs to her debts.

Held also, the husband's heir was entitled to her moveable property as her heir, and that such property was in his hands chargeable with her debts.

1879

SHEOTUHUL RAM v. NAM NARAIN SINGH.

Statement.

REGULAR APPEAL from a decision passed by the Deputy Commissioner of Hazareebagh, dated the 30th May 1878.

This was a suit to recover the sum of Rs. 20,233-8-3, principal and interest due upon a registered kistbundi bond, dated the 20th February 1872, executed in favour of the plaintiff's father, Joduram Sahu, since deceased, by the late Maharani Hira Nath Koeri, the widow of Maharajah Ram Nath Singh. Under the bond Joduram Sahu was to realize from certain mouzahs mentioned in a separate *khusra*, the amount then due to him; but if the amount were not so realized, it should be paid by the Maharani herself with interest at 24 per cent. per annum.

The Maharani died in Jeit 1930 S. (corresponding with March, 1873) having kept the mouzahs in her own possession and paid off the first two only of the instalments due upon the bond. The defendant, who was the heir of the Maharajah, is now sued as her heir and representative for the balance.

He denies that he is the heir of the Maharani, and alleges that the particular villages which the Maharani held had been granted to her for her maintenance only, and that upon her death he succeeded to them as heir of her husband.

These villages, which brought in Rs. 16,000 or Rs. 17,000 per annum, were granted to her by a deed of gift in the following terms :—"The under-mentioned villages granted as a *gift* (buksh) to the Maharani for meeting her necessary *deorhi* expenses."

On the death of the Maharani all the *deorhi* villages and all the moveable property found in her apartments were taken possession of by the Court of Wards. Subsequently, under decrees of the High Court, first, the landed property and afterwards the moveable property in the possession of the Court of Wards, was made over to the defendant, the moveable property being given up upon receipts granted by the defendant and describing it as the property of the Maharani.

The Deputy Commissioner decided that no part of the property received by the defendant came to him as the Maharani's heir, and consequently, that he was not liable for any portion of the sum claimed.

The plaintiffs thereupon appealed to the High Court.

Baboo *Chunder Madhub Ghose*, Baboo *Nil Madhub Bose*, and Baboo *Okhil Chunder Sein*, for the Appellants.

Gregory, and Mr. *H. E. Mendes*, for the Respondent.

The judgment of the Court (1), which was as follows, was delivered by

Judgment.

GARTH, *C.J.*

GARTH, *C.J.*:—

We think that the judgment of the Court below requires some modification.

The claim is for a sum exceeding Rs. 20,000, principal and interest, upon a bond which was given to the plaintiff by Maharani Hira Nath Koeri, on the 20th of February 1872, and the defendant is sued for this money as the heir and representative of the Maharani.

The defendant claimed to be the next-of-kin of the Maharajah (the Maharani's late husband), and brought a suit against the Maharani during her life to recover the Maharajah's property.

After the Maharani's death the Court of Wards took possession of the whole of the property in her hands, both moveable and immoveable, including a great many things which constituted her *tridan*; and upon the suit between her and the defendant being decided in his favour by the High Court, the Court of Wards handed over the whole of the property to the defendant, the immoveable part of it by virtue of the High Court's decree, and the moveable upon the defendant giving certain receipts, which were in evidence in this cause, by which he admitted that the various articles described in the receipts were the Maharani's property, and that he took charge of them as such.

At the trial of this cause in the Court below both parties appear, for purposes of their own, to have made no distinction between the two kinds of property, the plaintiffs wishing to obtain a decree binding both the moveable and immoveable properties, and the defendant wishing to establish that both properties came into his hands under the decree of the High Court.

The consequence was, that it was not sufficiently considered in the Court below by what different right or title each kind of property had come into the hands of the defendants.

(1) GARTH, *C.J.*, and MCDONELL, *J.*

1879

SHEOTUHUL RAM v. NAM NARAIN SINGH.

Judgment.

GARTH, C.J.

The Court decided, that no part of it came to the defendant as the Maharani's heir, and consequently that he was not liable for any part of the sum claimed.

It has now been contended on appeal, on behalf of the plaintiff, that both the moveable and a large portion of the immoveable property, was in fact chargeable in the hands of the defendant for payment of this debt; the former, upon the ground that the articles mentioned in the receipts were the Maharani's *stridan* and that the defendant was her heir; and the latter, upon the ground, that certain villages were conveyed by the Maharajah in his lifetime to the Maharani by a deed of gift in such terms as to make them her absolute property.

In support of this last contention a case has been cited to us from 7 B. L. R., 697, *Srimati Pobitra* vs. *Damador Jana*, in which, under a deed somewhat similar in its terms to that in the present case, it was held, by two of the Judges of this Court, that the widow to whom the property was conveyed acquired an absolute right to it.

On referring, however, to the language of the deed in this case, we have no doubt whatever that it was intended only to make a provision for the Maharani for her maintenance, and that it consequently operated as a conveyance of the villages in question for her life only; so that the defendant took them not as her heir, but under the decree of the High Court; and that they would not be chargeable in his hands for this sum claimed in the suit.

But the moveable property stands upon a different footing. That was clearly admitted and received by the defendant as being the property of the Maharani, and the plaintiff contends that the defendant was the Maharani's heir in this way,—that assuming the marriage of the Maharani to have been in the usual and legal form, her property, inasmuch as she died a childless widow, would, by law, go to her husband, or her husband's heirs; and that, as the defendant had been held by the High Court to be the Maharajah's heir, he would also take the Maharani's property as her heir.

In support of this contention we have been referred to Mitakshara, chapter 2, section 11, and verse 145, and we

the plaintiff's argument is well founded. The respondent's counsel says that all the defendant did and all he professed to do when he signed those receipts, was to take charge of the property. But considering, as we do, that the defendant was in fact the Maharani's heir, it is clear that his right, and his only right, to hold the property now, is in that character.

We therefore think, that to the extent of the property mentioned in the receipts, the defendant is answerable for the amount of this debt. The only difficulty which we feel is as to the means which should be taken for the purpose of ascertaining the value of that property. We think that the proper course will be for the Deputy Commissioner to ascertain, in such a way as he thinks most convenient and effectual for the purpose, what the value of these articles is. As regards some of the things he may deem it right that they should be produced before himself in Court; and with regard to other and less portable things, he may send a commissioner to inspect them; and both parties will be at liberty to give evidence with regard to their value.

The defendant, as having taken charge of the property and being answerable for the debt to the extent of that property, ought to satisfy the Court as to its nature and value; and if any of the articles specified in the receipts are not produced, he is the person to whom the Court would properly look, and from whom it has a right to expect all reasonable information.

We only throw out these suggestions for the guidance of the Deputy Commissioner in holding the enquiry. He will return his finding as to the value of the moveable property specified in the receipts to this Court, and the case will then be brought before us for final disposal.

[PRIVY COUNCIL.]

1879 July 6th.

AUSHUTOSH DUTT . . . . . APPELLANT;

AND

DOORGA CHURN CHATTERJEE AND ANOTHER RESPONDENT.

Hindu Law—Will, Construction of—Idol, Dedication of property to—Attachment.

J. D. by her will dedicated certain property to an idol, directing that "the Sarodia Poojah and other ceremonies will be performed as hitherto. After all these acts have been observed from the proceeds of the said property, if there be a surplus in the profits, then the family will be supported therefrom. This property will not be liable for the debts of any person * * * * Collecting the proceeds of this property you will deduct therefrom the rent, revenue, etc., and will defray from the aforesaid profits the expenses of the daily worship of the said idol * * * * , and if there be a surplus after deducting the said expenses, it will also be disbursed in the manner aforesaid * * * My heirs will have no power of gift or sale over the property; and it will not be attached or sold on account of their debts." The sons of the testatrix were appointed executors.

Held, reversing the decision of the High Court, that the effect of the will was to charge the property in the hands of the executors with the payment of such sums as might be necessary to defray the expenses which might, from time to time, be incurred in the daily worship of the idol in the manner in which such service was performed at the time of the death of the testatrix, and that after defraying such expenses the surplus belonged to the members of the joint family, and that the interest of the sons therein was liable to be attached in execution.

THIS was an appeal from a decision of a Divisional Bench (GARTH, *C.J.*, and MORRIS, *J.*,) of the High Court of Calcutta of the 5th December 1876, which affirmed the decree of the Subordinate Judge of Hooghly, dated the 6th August 1876, which had reversed a decision of the Judge of Hooghly, dated the 2nd September 1874, made in favour of the appellant.

The suit in which those decisions were passed had been instituted by the respondents as shebaits of a family idol to pro-

1879

AUSHUTOSH DUTT v. DOORGA CHURN CHATTERJEE.

Statement.

· for execution of a decree obtained by the appellant
)oorga Churn, the first of the respondents, being carried
ıe sale of his interest in a certain talook called Panch-
)n the ground that Doorga Churn was interested therein
ıebait of the idol, and that there was no personal or
interest of his which could be legally sold.
ıdgments and decrees of High Court and Subordinate
ncurred in so holding, and the question in this appeal
ther the sale ought not, under the circumstances, to have
wed to proceed.

rcumstances were as follows:—The talook in question
hased on the 28th May 1858, by the respondent's father,
)o Nath Chatterjee, with his own monies in the name
fe Saraswati Debi, and by him given to her. Besides
ies applied to this purchase, Shumbhoo Nath was
. of but little property.

)ns, the respondents and their minor brother, had
rty of their own. Doorga Churn, the elder of the respon-
gaged in business while in commensality with his father
:hers, but this business failed. In June 1864, he
. Rs. 3,500 at 12 per cent. from the appellant on a
ry note, and in respect of this loan the appellant obtained
rte decree in the High Court on the 16th November

that decree was still unsatisfied, Saraswati, on the 14th
:868, executed an instrument, (which will be found set
r in the judgment of the Judicial Committee of the Privy
by which she dedicated the talook Panchgatchia to the
in her house, and directed that all the ceremonies which
ierto been performed should be observed and paid for out
ıroceeds of the said talook, and that if there should be
plus in the profits, the family should be supported
n.

)pointed her sons to be executors. Saraswati died in 1871.
ling to the admission of the executors no account of the
re of the income dedicated to the idol was kept prior
pril 1870)—*i.e.*, for the first two years after the endow-

1879

AUSHUTOSH DUTT v. DOORGA CHURN CHATTERJEE.

Judgment.

The appellant having taken out execution of his decree i the Court of the Judge of Hooghly, and attached the interest o Doorga Churn in the talook, the respondents intervened unde section 246 of the Code of Civil Procedure (Act VIII of 1859), and objected to the attachment on the ground that they hel it with Doorga Churn merely as trustees of the idol.

The Judge rejected the objections. The present suit was the instituted before the Subordinate Judge to set aside the orde of the Judge, and to have the attached property declared to b *debutter*.

The Subordinate Judge set aside the order and released th property as being debutter from attachment. And on appeal t the High Court this decision was confirmed.

Against the judgment of the High Court an appeal was the upon preferred.

Leith and *Doyne*, for the Appellant, contended that assumi that the object and effect of the will of Saraswati Debi was t create an endowment, and substantially for religious uses, t respondent was nevertheless possessed of the talook in questi not only as shebait for those uses, but also, on his own accou and his personal and beneficial interest therein, was liable to attached and sold. That the alleged endowment was a m device, whereby Saraswati Debi intended to bequeath the talo to her sons and the family for their own use and benefit witho liability to the satisfaction of their debts. That the respondent had failed to prove that no part of the surplus profits of t talook was applied by Doorga Churn to his own use, or that was possessed of any other income whatsoever.

No one appeared for the Respondents.

The judgment of the Judicial Committee (1) of the P Council was as follows :—

The principal question to be determined in this appe whether or not the respondent Doorga Churn Chatterjee had

(1) Sir JAMES P. COLVILE, Sir BARNES PEACOCK, Sir Mon E. SMITH, and Sir ROBERT P. COLLIER.

1879

AUSHUTOSH DUTT v. DOORGA CHURN CHATTERJEE.

Judgment.

ght, title, or interest in a certain talook called Lot Panchgat-ia, in Zillah Hooghly, liable to be attached and sold in execu-on of a money-decree against him. The question arose in this anner :—The appellant sued him in the High Court, Original urisdiction, and on the 16th November 1864 obtained a decree gainst him for Rs. 3,500, with interest and costs. In execution f that decree an attachment was issued. The attachment is not n the record, but it appears from the plaint that under it a one-ird share of the talook was attached, and thereupon Doorga hurn (the debtor) and his brother Shama Churn, who are the spondents in this appeal, intervened and put in a claim to the operty, alleging that it was not liable to attachment, inasmuch they held it in trust for an idol, Raj Rajeswar, by virtue of a ll executed by their mother Saraswati. The Judge of Hooghly, ving investigated the claim, distrusted the genuineness and *ad fides* of the will; he stated that he did not believe that the operty was held in trust for the idol, and, under the provisions section 246 of Act VIII of 1859, disallowed the claim of the spondents, and ordered the execution to proceed (Record, p.). The present suit was consequently brought by the respon-nts against the appellant under the same section, to set aside order of the Judge, and prayed that the will executed by r late mother should be confirmed; that the share of the ook which had been attached and ordered to be sold should be lared debuttur property, or property dedicated to religious , and not liable to be attached or sold for a private debt of rga Churn. (Plaint, Record, p. 2.)

A written statement was put in on behalf of the defendant, several issues were raised, and amongst them the 3rd, 4th, 5th, which were the material ones on the merits. The 3rd whether the will set up by the plaintiffs was a genuine docu-t, and whether the mother, Saraswati, endowed the property it for the sole benefit of the idol, and whether the profits of isputed estate had been appropriated to the idol alone. 4th, er the plaintiffs were entitled to a declaration that the was not liable to be attached and sold in execution decree obtained against one of them personally. 5th, er the plaintiffs were the beneficial owners of the pro-

1879

AUSHUTOSH DUTT v. DOORGA CHURN CHATTERJEE.

Judgment.

perty. The Subordinate Judge found in substance that the w was genuine, that it was not colourable or fraudulent, and th it was intended to be acted upon, and thereupon he held that t property was debuttur, and not liable to be attached or sold f a private debt, and ordered it to be released from attachmen Each party was ordered to bear his own costs. (Decree, Recor p. 48.)

Upon appeal to the High Court it was contended that th lower Court was wrong in finding that the will was a *bonâ fi* instrument, and that the Court ought to have found upon th evidence on the record and the probabilities of the case that th will did not create a *bonâ fide* endowment, but was a mere devi to secure the property from sale in execution of decree; that th endowment to the household idol was a mere colourable device t give a show of legality to a transaction which was in reality perpetuity, and to preserve the property in the hands of th family, and that, as such, it was void and illegal.

Further, it was contended that under any view of the natu and effect of the will the debtor, Doorga Churn, had a consid able beneficial interest in the property.

The High Court affirmed the decision of the lower Cou They said:—"We have no doubt that the will made by Srim Saraswati Debi is a valid disposition of her property, and th the effect of it was to create an endowment substantially for reli ous uses. That being so, it is clear that the attachment iss against a share of this property at the instance of the executi creditor, and the order made by the Judge of Hooghly that execution should proceed, ought both to be set aside; and i impossible to say that the Subordinate Judge was wrong confirming the will, and declaring the subject of it to debuttur property. It may be that, under that clause of instrument which disposes of the surplus proceeds of the es the 'shanshar,' or members of the family establishment, hereafter become entitled to some beneficial interest in surplus; but this interest is of such a fluctuating and unce character that it could never form the subject of attachme sale."

The lower Court having found that the will was genuin

bonâ fide, and the High Court having upheld the decision, it has not been attempted to dispute that finding. It must, therefore, be assumed that the will was genuine and *bonâ fide* intended to operate; and effect must be given to it, so far as its provisions are in accordance with law.

The will is in the words following :—

"This will is executed by Srimati Saraswati Debi. I am always sick; hence I execute this will to the following effect :— I dedicate the auction-purchased property, No. 3496, Lot Panchgatchia, Pergunnah Baligori, Zillah Hooghly, standing in my name, to the Thakur Ishwar Raj Rajeswar that is in my house. And the Sarodia Pooja and other ceremonies that are being performed in the house will be performed as hitherto. After all these acts have been observed from the proceeds of the said property, if there be a surplus in the profits, then the family will be supported therefrom. This property of mine will not be liable for the debts of any person. None will be able to transfer it. None will have the rights of gift and sale. I appoint my eldest son Doorga Churn Chattopadhya and the second son Shama Churn Chattopadhya to be the executors of this will. When my youngest son Bhogobati Churn Chattopadhya, who is now a minor, arrives at majority, he will similarly be an executor. Collecting the proceeds of this property, you will deduct therefrom the rent, revenue, taxes, charges for repairs, and whatever other expenses may be necessary for the preservation of property, and the collection charges; and will defray from the aforesaid profits the expenses of the daily worship of the said Thakur, the expenses of the *parbans*, *i.e.*, the *Dole jattra*, the *Rashjattra*, &c., on his account, [the expenses of] the Doorga Pooja, the Shama Pooja, and the Jagadhatri Pooja, the expenses of the annual *shradh* of my father-in-law, of the first *shradh* of myself and my husband after our death, and the expenses of our *ekodista* and *sapindikaran*. I appoint you as the executors of this will. You will pay my debts, and, collecting the sums due to me, you will incorporate them with my estate. And from the proceeds thereof you will meet the expenses described above; and if there be a surplus after deducting the said expenses, it will also be disbursed in the manner aforesaid. After your death,

1879

AUSHUTOSH DUTT v. DOORGA CHURN CHATTERJEE.

Judgment.

he who is my heir for the time being will be the executor this will. Beyond performing the aforesaid worship of the d and the ceremonies and *poojas*, none of my heirs shall have a interest in or profit from my property. And they will ha no power of gift or sale over it. And it will not be attached sold on account of their debts. To this effect, of my own acco and in full possession of my senses, I execute this will. The 2n of Cheyt 1274.

"SARASWATI DEBI."

According to the construction which their Lordships put upo the will, it cannot be said that the property was wholly debutta They consider that it created a charge upon the property for th expenses of the daily worship of the idol, as it was performe at the time of the death of the testatrix, and of the pooja shradhs, and religious ceremonies for which provision is mad by the will. For the purpose of this decision the charge may b termed generally a charge for such religious acts and ceremonie So far the case falls within the class of which that of *Sonatu Bysack* vs. *Sreemutty Juggutsoondree Dossee*, 8 Moore, I. A., p 66, may be referred to as an example.

The next question that arises is, who are entitled to the ben ficial interest in the talook, subject to the religious and cerem nial trust. The testatrix has certainly attempted to dispose this, and, if she has done so effectually, it cannot be held, has been held in some cases, to have passed to her sons in th character of heirs-at-law as property undisposed of. Her di position is contained in the words "after all these acts ha been observed from the proceeds of the said property, if the be a surplus, then the family will be supported therefrom."

Their Lordships, not without some doubt and hesitation, h come to the conclusion that these words amount to a bequ of the surplus to the members of the joint family for their use and benefit. It is true that the testatrix further decla "this property of mine will not be liable for the debts of person. None will be able to transfer it, none will have rights of gift and sale." But these directions, being in sistent with the interest given, were wholly beyond her po and must be rejected as having no operation. This bei

follows that Doorga Churn took a share of the property in stion, which, after satisfying the expenses actually incurred the worship of the idol, cannot be assumed to be valueless, i might be considerable, and which, in their Lordship's opi- n, was subject to be taken in execution by his creditor. Inas- ch as their Lordships are not precisely informed of the state the family on the death of the testatrix, they are unable to cify what that share was, and there being no *constat* as to at is required for the performance of the religious trust, the erest acquired by a purchaser at any such execution sale would e to be ascertained and realized in some other further pro- ding. In these circumstances, their Lordships are of opinion t the attachment should be allowed to stand; but that the mmary order of the Judge of Hooghly, which would appa- tly authorise the sale of one-third of the talook, as if un- cted by the will of the testatrix, is erroneous, and should be aside.

hey will, therefore, humbly advise Her Majesty that the rees of both the lower Courts be reversed; that it be de- ed that the will of Saraswati was a genuine will and *bonâ fide* nded to operate; and that the effect of the will was to charge property in the hands of the executors thereby appointed the payment of such sums as might be necessary to defray expenses which might from time to time be incurred in the y worship of the idol therein mentioned, in the manner in ch such service was performed at the time of the death of testatrix, and with the expenses of the parbans and of the as and other religious acts and ceremonies in the said will tioned; that, after defraying such expenses, the surplus nged to the members of the joint family, of whom Doorga rn was one, and that his interest in the talook, under the will, was liable to be attached and sold in execution of the e of the High Court of the 16th of November 1864; and der that the summary order of the Judge of Hooghly be ide, but that the appellant be at liberty to proceed to a execution of the right, title, and interest of Doorga in the said talook under the said will, and that each party their own costs of the suit in both the Courts below.

1879

The appellants having failed in their attempt to impeach t genuineness and *bonâ fides* of the will, their Lordships are opinion that they are not entitled to the costs of this appeal.

[CIVIL APPELLATE JURISDICTION.]

JAJAN (JUDGMENT-DEBTOR) . . . . . APPELLANT; 1879.

AND *August* 15*th*.

HI NATH PANDAY AND ANOTHER (DEE-HOLDERS) . . . . . } RESPONDENTS. No. 71 of 1879.

cution of decree—Mesne profits, Pro-formâ defendant not liable for.

Where, in a suit for possession and mesne profits, no specific mention s to mesne profits is made in the decree, (the decree merely declaring at the plaintiff's suit be decreed), the Court executing the decree ust look to the plaint to see from whom the relief granted is to be btained, and ought not to allow execution to issue against a *pro-formâ* efendant against whom no relief was claimed.

his case the decree-holder prayed that the mesne profits for ears 1284 and 1285 of certain property should be ascertain- terms of a decree, dated 22nd June 1877.

e suit in which this decree was made, was for possession of has of land, and Rs. 248 as mesne profits for the years 1282- . The First Court dismissed the suit, but on appeal the de- of that Court was set aside, and an order made that the tiff's suit "be decreed."

e present appellant, Monajan, it appears, was made a *pro-* defendant in the suit, and an application having now been s to execute the decree against her for mesne profits, she ts that she ought not to be held liable to pay the

no allegation was made in the plaint against her, and the e itself did not expressly make her liable thereunder, the iff before whom the application was made exempted her all liability, leaving the decree-holder to recover against the defendants only.

ppeal, however, the District Judge was of opinion that in ng a joint decree against several persons the Court had no

1879

MONAJAN v. KASHI NATH PANDAY.

Judgment.

power to exempt any of them, and accordingly set aside the Moo siff's order.

Monajan thereupon referred this second appeal to the Hi Court.

Moonshee *Mahomed Yusoof*, for the Appellant.

Baboo *Mohinee Mohun Roy*, Baboo *Kali Kishen Sen*, and Bab *Surendro Nath Mutty Lall*, for the Respondents.

The judgment of the High Court (1) was as follows :—

Under the Civil Procedure Code, Act X of 1877, as originall passed, no second appeal was allowed in this case. By the amend ing Act XII of 1879, which received the assent of the Governo General on the 29th of July, the right of appeal, existing und the former Code, has been restored, and this Court is now com petent to entertain this appeal,—*vide* sections 2, 90, and 102 the latter enactment.

We think that the decree of the lower Appellate Court, which the decision of the Moonsiff was reversed, was erroneou and we are satisfied, on the first ground taken in the mem randum of appeal, viz., that the Court has misconstrued t decree in holding that the appellant was thereby made lia for wasilat.

The suit was brought against three sets of defendants to cover possession and mesne profits. It was dismissed in First Court. On appeal by the plaintiff it was ordered that appeal be decreed; that the judgment of the lower Court be aside; that the plaintiff's suit be decreed; and that the costs saddled upon the defendants.

As to wasilat, therefore, the Appellate Court's decree made specific mention, and in fact execution of the decree would impossible unless it should be read with the plaint. And plaint shows not only what was claimed, but from whom. the three sets of defendants, the first two were sued as the wr doers. The present appellant was the third party defendant; appears to have been merely a *pro-formâ* defendant. No

(1) MITTER and TOTTENHAM, *J.J.*

was alleged against her, nor was she alleged to be in possession of the property claimed. In fact nothing was claimed from her. The decree, therefore, being supposed to be in terms of the plaint, the relief decreed was only that which was claimed in the plaint and was given only against those from whom it was claimed. 1879

This being so, the present appellant is not liable for any wasilat under the decree in question. We, therefore, set aside the decree of the lower Appellate Court with costs.

[ADMIRALTY JURISDICTION.]

IN THE MATTER OF A COLLISION BETWEEN THE "AVA" AND "BRENHILDA."

Act IV of 1875, *sections* 3, 4, 5—17 *and* 18 *Vict., c.* 104, *section* 242—25 *and* 26 *Vict. c.* 63, *section* 23—*Special Court—Investigation of charges under section* 5 *of Act IV of* 1875—*Jurisdiction.*

Under section 5 of Act IV of 1875, the High Court in its Admiralty Jurisdiction may be authorized by the Local Government to investigate charges of incompetency or misconduct against holders of Board of Trade certificates, without respect to any power in any other tribunal to enquire into wrecks and casualties; and a Court, so authorised, is empowered under section 242 of the Merchant Shipping Act, 17 and 18 Vict., cap. 104, and section 23 of 25 and 26 Vict., cap. 63, to suspend or cancel such certificates.

While the sections in Chap. II of Act IV of 1875, subsequent to section 5, are applicable not only to the Court investigating charges under that section, but also to a special Court constituted under section 4, the local restrictions laid down in section 3 have no reference to investigations under section 5.

An investigation already held by a special Court under section 4, where no charges have been preferred against individuals, is no bar to a second investigation into charges of misconduct or incompetency by a Court constituted under section 5.

The conditions imposed by section 23 of Act 25 and 26 Vict., cap. 63, and by section 14, sub-section (a) of Act IV of 1875, are binding upon a Court constituted under section 5.

The word "ordered" in these sections refers to orders, in England, by the Board of Trade, and, in India, by the Local Government.

1879

In re "AVA" AND "BRENHILDA."

Statement.

IN this case the Officiating Advocate-General (Mr. J. D. Bell) applied to the Court in its Admiralty Jurisdiction to investigate charges of incompetency and misconduct, preferred under the direction of the Local Government against T. W. Whittard, the Second Mate of the steam ship "Ava" and John Scurr, the Master of the sailing ship "Brenhilda."

The application arose out of the circumstances of a collision on the 24th May 1879 between these vessels, which resulted in the total loss of the former.

An investigation had already been held by a special Court constituted under section 4 of Act IV of 1875, resulting in a finding entirely exonerating the "Ava," but imputing some blame to the Captain of the "Brenhilda." No charges, it seems, were preferred at that investigation against either the Mate of the "Ava" or the Captain of the "Brenhilda." The report and finding of this Court being submitted to the Local Government, the Lieutenant-Governor was of opinion that a further investigation should be held, and an inquiry made into the conduct of both the Mate of the "Ava" and the Master of the "Brenhilda;" and the Officiating Advocate-General was accordingly directed to bring the matter before the High Court in its Admiralty Jurisdiction.

The petition upon which the Advocate-General applied alleged *inter alia* that, at the time of the collision, the "Ava" was in charge of the Second Mate, who was then the officer on watch; that the collision had taken place "in the Bay of Bengal"; that upon the arrival of the "Brenhilda" in Calcutta, an investigation had been directed by the Lieutenant-Governor of Bengal to be made into the circumstances attending the collision; and that such investigation had been held, and the proceedings had therein reported to the Lieutenant-Governor, who considered there were grounds for charges of incompetency and misconduct being preferred against the Mate of the "Ava" and the Captain of the "Brenhilda."

The charges of incompetency and misconduct, which it was thought necessary to prefer against each, were annexed to the petition.

1879

In re "AVA" AND "BRENHILDA."

Argument.

·der was made on the 10th of July fixing the 22nd July nvestigation.

s also directed that the petition should meanwhile be l, so that it should appear upon the face of it, as was , that at the former investigation no charges had been d against individuals; and that on being so amended, hereof and of the charges should be served upon the

s also arranged that the charges against the Mate of the and against the Master of the "Brenhilda" should be parately, the former being taken first.

the investigation being taken on the 22nd July, objec- re taken on behalf of Whittard to the jurisdiction of the

Bell, (Officiating Advocate-General), *Phillips*, (Officiat- ıding Counsel), and *O'Kinealy*, for the Government.
roffe, *Jackson* and *Henderson*, for Whittard.

·*offe*.—The petition under which the enquiry is asked is , for it does not purport to be made under any Act. If it ınder Act IV of 1875, no statement of the grounds of ges having been made or transmitted to the Court or to ɜons charged, as required by sections 6, 7 and 14, the as no jurisdiction.

ıere are other objections. The Advocate-General had ɔrity under Act IV of 1875 to institute these proceedings. ın officer, not of the Bengal Government, but of the ıent of India. He cannot, therefore, be said to be "such ıs the Local Government may have empowered in this as described in section 5. The officer there contemplated ıcer appointed as is the Wreck Commissioner in the Kingdom.

ar, the collision is not such as can be enquired into under . The petition states that it took place in the Bay of d not "on or near the Coasts of British India," in ection 3. The collision actually took place 60 or 70 the Coast.

1879

In re "AVA" AND "BRENHILDA."

Argument.

There must be some territorial limitation. No Court in Bengal could investigate a collision happening on or near the Islan of Bombay, even under clause (*d*) of section 3. (Cf. 17 an 18 Vic. cap. 104, where there is a material difference in the cir cumstances giving jurisdiction in the case corresponding t clause (*d*)).

Again it is submitted that section 5 must be read in connexion with clause 3, and therefore it ought to have appeared that th collision took place on or near the Coast appertaining to th territorial jurisdiction of the particular Local Government whic directed the inquiry. The last words of section 5 must impor into that section the local restrictions of section 3.

Then it appears from the petition that "an investigation ha been made by a Court of Enquiry" (phraseology not found in th Act), and that there has been a report made. This was the forma investigation under sections 3 and 4.

Now the Courts referred to in section 9 include the special Cour under section 4; and that Court, if there were grounds for charg ing any one with incompetency or misconduct, could at once hav commenced an investigation into such incompetency or misconduct It must be taken, therefore, that there were no such ground in the opinion of that Court. But it is clear that my client wa liable to have been put on trial at the former investigation on th very charges now brought against him, and might, under sectio 16, have been arrested or bound over to appear.

Now it could not have been intended that the Local Gover ment should have power, after an investigation by a special Cou under section 4, again to subject Masters, Mates, &c., of shi to charges before a Court having Admiralty Jurisdiction un section 5, and to re-open the question of shipwreck or ot casualties affecting ships. It is submitted that under the Ac was only open to the Local Government to proceed either un the provisions of section 4 or section 5.

Under the English Act, (see section 241,) there is a clear distin tion with respect to charges of incompetency and misconduct, as regards enquiries or investigations for the purpose of susp ing or cancelling certificates.--See section 242 and sections *et seq.*

Section 432 of the English Merchant Shipping Act is, save as to the 4th sub-section, the same, word for word, as section 3 of Act IV of 1875; and it is recited in Act I of 1859, as also in the amending Act XXVIII of 1861, so that the existing difference between the present Act and the English Act is apparently intentional. But under Act XXVIII of 1861, a Court having Admiralty Jurisdiction in India, while it had power to hold an enquiry as to charges of incompetency or misconduct or as to casualties affecting ships, had no power to suspend or cancel certificates. It had power merely to report the result to the Local Government. After the passing, however, of 25 and 26 Vict., cap. 63, which provided that the power of cancelling or suspending certificates conferred on the Board of Trade should vest in and be exercised by the Local Marine Board, Magistrate's Naval Court, Admiralty Court or other Court or Tribunal by which the case is investigated or tried (section 23), another Act was passed in India, Act XV of 1863, which provided by section 4, that every Court having Admiralty Jurisdiction in India might suspend or cancel certificates: Provided that no certificates shall be cancelled or suspended unless a certificate of the report or statement of the case upon which the investigation is made shall have been furnished to the owner of the certificate.

Now no such report or statement of the case has been furnished.

[WILSON, *J.*—What meaning do you attach to the word "report?" Do you read that section as contemplating two investigations?]

The section is taken bodily from sub-section 6 of the section in English Act (which refers to a report not otherwise mentioned in the Indian Act.)—See the case of "John Chism" reported only in the *Englishman*, October 29th, 1868.

But Act IV of 1875 was passed with reference to 25 and 26 Vict., cap. 63, which merely transferred the power of cancelling or suspending certificates from the Board of Trade to Admiralty Courts, &c., giving no power which the Board of Trade did not possess.

[WILSON, *J.*—Do you contend that the Court can only act on report of a Court of Enquiry?]

1879

In re "AVA" AND "BENHILDA."

Argument.

The Board of Trade could only act on such a report, and the Admiralty Court, when substituted, would be subject to the same limitation.

I have already submitted that my client has already been imperilled, but I further contend that the whole matter is *res judicata*. It is not a mere question of incompetence or misconduct that this Court is asked to enquire into. The whole question of the loss of the ship must be gone into.

Jackson (on same side) :—

The words "on or near" in section 3 must mean almost touching the Coasts of India.

As I read Act IV of 1875, sections 6, 7 and 8 have no reference to this Court, but only to the special Court.

The words "not so charged by the Local Government" in section 9 show that sections 7 and 8 refer only to that Court.

Assuming that section 6 does apply to this Court, it is necessary that the grounds of the charges should have been transmitted to the Court, and not the charges merely. This has not been done, and the Court has therefore no jurisdiction.

J. D. Bell, (Officiating Advocate-General) :—

In matters affecting public policy the Local Government can put the Advocate-General in motion. The fact of the Advocate-General being an officer of the Government of India is no disqualification in a case where he is put in motion by the Lieutenant-Governor. The objection taken to the title of the petition may be set aside, for there is nothing to prevent an amendment.

There is nothing in the preamble or elsewhere in the Act to show that section 3 has any connection with section 5.

The special Court under section 4 of Act IV of 1875 has no power to cancel certificates, the sections of Chap. II subsequent to section 5 having reference only to the procedure of Courts acting under that section.

The power which the Board of Trade had under section 242 of 17 and 18 Vict., cap. 104, of cancelling its own certificate has been transferred to certain tribunals set out in section 63 of 25 and 26 Vict., cap. 53; and it is submitted that under the latter section this Court has now the power originally vested in the Board of Trade.

1879

In re "AVA" AND "BERNHILDA."

Judgment.

illips (on same side)—Granting that sections 6, 7 and 8 of V of 1875 apply to the special Court, they only empower ocal Government to prefer charges against any Master ate, leaving a choice as to the Court in which they o be preferred. But the special Court, it is submitted, o power to investigate personal charges, while that under n 5 may either make enquiries as to the conduct or compe- of Masters, or as to casualties affecting ships. I contend then section 7 relates back to section 5 and not to section 6. ing, therefore, has been done either by the special Court or ie Lieutenant-Governor to interfere with the jurisdiction s Court.

e special Court was apparently erected for the investigation ualties only.

odroffe (in reply).—It has been suggested that section 3 o reference to section 5, but there is no ground for such retation. Both sections appear under the same chapters eading.

e argument that the special Court had no power to investigate es is inconsistent with the view put forward in the petition Advocate-General, which alleges that "an investigation had place into the circumstances of the collision, but no charges een preferred against individuals," phraseology suggestive of es which might have been made. The words of section 9 which s of "any of the Courts hereinbefore mentioned" are also st that argument. Why, again, should there be a distinction in sub-sections (a), (b), and (c) in section 14 if other s are not entitled to cancel or suspend certificates?

re is no power to amend the petition, as suggested by the ate-General. It may be said the objection is technical, must be borne in mind that these proceedings are quasi-cri-

See the remarks of COCKBURN, *L. C. J.*, in the case of vs. *Mackonochie*, L. R. 3 Q. B. D., 775.

following judgment on the objections raised was delivered

WILSON, *J.*

J.:—

case the Advocate-General, on behalf of the Lieute-

1879

In re "AVA" AND "BRENHILDA."

Judgment.

WILSON *J.*

nant-Governor of Bengal, applied to the Court in its Adm Jurisdiction, under section 5 of Act IV of 1875, to inves charges of misconduct or incompetency against Thoma Whittard, 2nd Mate of the steam ship *Ava*, holding a Bo Trade certificate as master, and against John Scurr, Mas the sailing ship *Brenhilda*, holding a like certificate. Tl plication was made upon a petition which states, amongst things, that a collision took place on the 24th of May 18 the Bay of Bengal, between the two ships in question; th mate Whittard was in charge of the *Ava* at the time, and Scurr was the master of the *Brenhilda*. And charges statin specific misconduct or incompetency alleged against each annexed to the petition.

On the 10th of July, an order was made appointing the of July for the investigation, and directing summonses served upon the two persons charged, and further directing of the petition and charges to be served upon them, liberty to any party to apply for extension of time.

On the 22nd of July, Whittard, the Mate of the *Ava*, app by Counsel, and objected to the jurisdiction of the (The Master of the *Brenhilda* appeared in person, and that he wished to take no part in the proceedings a stage, but to leave the question of jurisdiction in the of the Court.

The question of jurisdiction was argued by Mr. Woo and Mr. Jackson on behalf of the Mate of the *Ava*, and Advocate-General and the Standing Counsel on the othe What has now to be decided is, whether this Court has ju tion to hold the investigation ordered. For the purpose of mining this question I propose—

(1.) To consider briefly what the previous course of legi upon the matter has been.

(2.) To examine the language of the Act under which proceedings have been instituted.

(3.) To deal in detail with the several objections raised jurisdiction in this case.

The Act now in question is, so far as India is concer last of a series dealing with the same subject-matters.

These Acts, so far as it is necessary to consider them for the present purpose, deal with three things :—

(*a.*)—Inquiries into charges of misconduct on the part of masters and others holding certificates, which misconduct may or may not be connected with wrecks or other casualties.

(*b.*)—Inquiries into wrecks and other casualties, which inquiries may or may not involve charges of misconduct.

(*c.*)—The cancelling or suspension of certificates as the result of either kind of inquiry.

It must be observed also that two kinds of certificates are dealt with Board of Trade certificates granted under the Merchant Shipping Acts of the United Kingdom, and certificates of local Governments under the Indian Acts.

The first Act to be considered is the Imperial Merchant Shipping Act, 1854, 17 and 18 Vict., c. 104. In Part III of that Act, entitled "Masters and Seamen," section 240 empowers a Court of Admiralty in certain cases, on the application of certain persons, summarily to remove a master. Section 241 enacts that, "if the Board of Trade or any Local Marine Board has reason to believe that any master or mate is from incompetency or misconduct unfit to discharge his duties, the Board of Trade may either institute an investigation, or may direct the local marine board to institute the same." The section goes on to provide for the constitution of the tribunal, the summoning of the accused, and his making his defence: and proceeds, "and thereupon such investigation shall be conducted, and the results thereof reported in the same manner and with the same powers in and with which formal investigations into wrecks and casualties are directed to be conducted, and the results thereof reported under the provisions of the eighth part of this Act."

In Part VIII of the Act, entitled "Wrecks, Casualties, and Salvage," section 432 enacts that:—"In any of the cases following (that is to say,) Whenever any ship is lost, abandoned, or materially damaged on or near the coasts of the United Kingdom;

Whenever any ship causes loss or material damage to any other ship on or near such coasts;

Whenever by reason of any casualty happening to or on board any ship on or near such coast, loss of life ensues;

1879

In re "AVA" AND "BRENHILDA."

Judgment.

WILSON, J.

Whenever any such loss, abandonment, damage or casualty happens elsewhere, and any competent witnesses thereof arrive, or are found at any place in the United Kingdom," certain local officers may hold a preliminary inquiry. By the following sections a formal investigation may be ordered. The Court to make it is prescribed; and the Court is required to report to the Board of Trade. For the power to suspend or cancel certificates it is necessary to turn back to section 242, which empowered the Board of Trade to do so in five cases, *viz*:—

"(1.) If upon any investigation made in pursuance of the last preceding section (that is on investigation into charges of incompetency or misconduct) he (the certificate holder) is reported to be incompetent, or to have been guilty of any gross act of misconduct, druukenness or tyranny;

"(2.) If upon any investigation conducted under the eighth part of this Act, or by a Naval Court, it is reported that the loss or abandonment of, or serious damage to, any ship, or loss of life, has been caused by his wrongful act or default;

"(3.) If he is superseded by the order of any Admiralty Court or of any Naval Court;

"(4.) If he is shown to have been convicted of any offence;

"(5.) If upon any investigation made by any Court or tribunal anthorised, or hereafter to be authorised by the legislative authority in any British possession, to make inquiry into charges of incompetency or misconduct on the part of masters or mates of ships, or as to shipwrecks or other casualties affecting ships, a report is made by such court or tribunal to the effect that he has been guilty of any gross act of misconduct, drunkenness or tyranny, or that the loss of or any serious damage to any ship or loss of life, has been caused by his wrongful act or default and such report is confirmed by the Governor or person administering the Government of such possession."

The same subjects are dealt with by the Indian Act, I of 1859. Section 80, closely following section 240 of the English Act, gives Courts of Admiralty the power of summarily removing a master in certain cases, and on the application of certain persons. Section 81, following section 241 of the English Act, says:—"If the Local Government.....has reason to believe that

any master or mate who has obtained a certificate of competency or service from such Government is from incompetency or misconduct unfit to discharge his duties, it may direct any Board or Officer at or near to the place at which it may be convenient for the parties and witnesses to attend, to institute an investigation; and thereupon such Board or Officer shall conduct the investigation, and may summon the master or mate to appear, and shall give him full opportunity of making a defence either in person or otherwise, and shall, on the conclusion of the investigation, make a report upon the case to the Local Government."

Section 100, following in the main the analogy of section 432 and the following sections of the English Act, provided for inquiries into wrecks and other casualties. It enumerated the casualties to be dealt with, provided for notice of their occurrence, and proceeded:—"It shall be lawful for the Local Government, whether such notice be given or not, if a formal investigation appears to it to be requisite or expedient, to appoint two persons to make the same. The investigation shall be held at such place as the Local Government shall deem best for the convenient examination of the witnesses. One of the persons to be so appointed shall be a magistrate acting in or near the place where the investigation is held; the other may be any person conversant with maritime affairs." Section 101 conferred the necessary powers upon the tribunal so formed, and section 102 directed it to report to the Local Government.

For the power of suspending or cancelling certificates of the Local Government we must turn back to section 82. The Local Government, by that section, could cancel such certificate held by any master or mate:—(1) if upon an inquiry under section 81 he were reported to be incompetent, or to have been guilty of any gross act of misconduct, drunkenness or tyranny; (2) if upon an investigation under section 100 and the following sections, it were reported that the loss or abandonment of or any serious damage to any ship, or loss of life, had been caused by his wrongful act or default; and in certain other cases, corresponding to those in sub-sections 3, 4, 5, in section 242 of the Merchant Shipping Act.

The next enactment is Act XXVIII of 1861. It recited

1879

In re "AVA" AND "BERNBILDA."

Judgment.

WILSON, J.

section 242 of the Merchant Shipping Act, 1854, by which the Board of Trade could cancel its certificates upon the report of "any Court or tribunal authorised or hereafter to be authorised by the legislative authority in any British possession, to make inquiry into charges of incompetency or misconduct on the part of masters or mates of ships, or as to shipwrecks or other casualties affecting ships;" and section 82 of the Indian Act I of 1859, by which the Local Government could cancel its certificates upon a like report of a similar tribunal. It further recited that it is expedient to authorise Courts or tribunals in India to make such inquiry and report. Section 1 then enacts that "every Court having Admiralty Jurisdiction in India and the principal Court of Ordinary Criminal Jurisdiction at every port in India where there is no Court having Admiralty Jurisdiction, is hereby authorised to make inquiry into charges of incompetency or misconduct on the part of any master or mate of any ship, whether such master or mate shall have obtained his certificate from the Board of Trade or from any Local Government, or as to shipwrecks or other casualties affecting ships." The section goes on to say that in case certain kinds of misconduct appear, the Court is to report to the Local Government. The same Act, section 3, gave to Criminal Courts, where there was no Admiralty Court, the power of summarily removing a master conferred upon the Admiralty Court in section 80 of Act I of 1859.

This Act made several important changes; First, though there was before power in tribunals constituted under section 81 of Act I of 1859, to investigate charges of misconduct against persons holding Local Government certificates, and in those under section 100 and the following sections to inquire into wrecks and casualties, including of course the power to investigate charges of misconduct incidentally arising, there appears to have been no Court in India empowered to investigate charges of misconduct generally against holders of Board of Trade certificates. Secondly, this Act, for the first time, gave to Courts of Admiralty and Criminal Courts the power of holding such inquiries, both those of both kinds—inquiries into charges of misconduct, and inquiries into wrecks or casualties.

The next change of importance in the law was by

Imperial Act 25 and 26 Vict., c. 63, the "Merchant Shipping Act Amendment Act, 1862." Hitherto the Board of Trade had itself cancelled its own certificates upon the report of the appropriate tribunal. Section 23 of this Act enacted that "the power of cancelling or suspending the certificates of a master or mate by the 242nd section of the principal Act (that is, the Act of 1854) conferred on the Board of Trade shall (with an exception not here material) vest in, and be exercised by, the Local Marine Board, Magistrate's Naval Court, Admiralty Court, or other Court or tribunal by which the case is investigated or tried, and shall not in future vest in or be exercised by the Board of Trade." The rest of the section need not here be noticed.

The next Act is the Indian Act XV. of 1863. It repealed sections 81 and 82 of Act I. of 1859, relating to investigation of charges, and the cancellation of certificates and the whole of Act XXVIII. of 1861, and made new provisions on the subject. Section 100 and the following sections of the Act of 1859 as to enquiries into wrecks and casualties, it left standing.

It enacted by section 4 that "every Court of Admiralty Jurisdiction in India, and the principal Court of Ordinary Criminal Jurisdiction at every port in India where there is no Court having Admiralty Jurisdiction, is hereby authorised to investigate and try charges of incompetency or misconduct on the part of any master, mate, or engineer of any ship, who shall have obtained his certificate from the Board of Trade, and to make enquiry as to shipwreck or other casualties affecting ships;" and the section goes on to empower those Courts to cancel or suspend such certificates. There were various conditions and restrictions upon the power, which it is not necessary here to consider.

Section 6 provided for the investigation of charges against holders of Local Government certificates. The Local Government might direct any Board or Officer to institute an investigation. But such tribunal could not cancel or suspend the certificate: its duty was to report to the Local Government.

These are all the Acts necessary to be noticed before that of 1875, which is the one governing the present case. The result is, that

1879

In re "AVA" AND "BRENHILDA."

Judgment.

WILSON, J.

immediately before that Act passed the law appears to have stood thus:—

A special Court, formed under section 100 of Act I of 1859, could enquire into wrecks and casualties of the kinds enumerated in that section, and must report to the Local Government. If its report inculpated the holder of a Local Government certificate, the Local Government could cancel or suspend the certificate.

If the report of the special Court inculpated the holder of a Board of Trade certificate, the power to cancel or suspend depended not on any Indian Act, but on the Merchant Shipping Acts. The Board of Trade could not cancel such certificate, because section 23 of the Merchant Shipping Act, 1862, took away the power. The Local Government never had any such power. The power rested in the special Court itself, which, being a Court authorised by the local legislature to enquire into wrecks and casualties within the meaning of section 242 of the Merchant Shipping Act, 1854, had, by the joint effect of that section and section 23 of the Act of 1862, authority to cancel Board of Trade certificates, subject to the restrictions therein laid down.

Admiralty Courts, and in their absence Criminal Courts, had authority under section 4 of the Indian Act XV of 1864, to investigate charges against holders of Board of Trade certificates and both under the Merchant Shipping Acts and that Act had power, if necessary, to cancel or suspend their certificates. The same Courts had, under the same section, power to investigate as to shipwrecks or other casualties affecting ships. The meaning of these latter words is not by any means clear; and as I shall have, on another occasion, to consider the same words as they occur in the present Act, I pass them by here. A Board or Officer, under section 6 of the same Act, could investigate like charges against the holder of a Local Government certificate, and on their report the Local Government could cancel or suspend the certificate.

I have omitted to notice the changes in the English and in the Indian legislation which have extended the jurisdiction of different Courts to engineers as well as masters and mates, but they do not affect the present inquiry.

In this state of things, the present Act IV. of 1879 was passed.

It repeals sections 100, 101, and 102 of Act I of 1859, and Act XV of 1863. That is to say, it repeals the whole Indian statute law relating to investigations into charges against the holders of certificates, whether of the Board of Trade or the Local Government, to inquiries into wrecks and casualties, and to the cancellation and suspension of certificates of either kind, with the exception of section 80 of Act I of 1859, which enables the Court of Admiralty in certain cases, and upon the application of certain persons (of whom the Local Government is not one), to remove a master, a power which was, by section 3 of Act XXVIII of 1861, and is now by section 23 of the present Act, extended to Criminal Courts.

The material provisions of the Act are as follows :—

Section 3 specifies certain cases of casualty, as follows :—

"(*a.*) Whenever any ship is lost, abandoned, or materially damaged on or near the coasts of India.

"(*b.*) Whenever any ship causes loss or material damage to any other ship on or near such coasts.

"(*c.*) Whenever by reason of any casualty happening to or on board of any ship on or near such coasts, loss of life ensues.

"(*d.*) Whenever any such loss, abandonment, damage, or casualty happens elsewhere, to or on board any ship registered at any port or place in India, under the Merchant Shipping Act, 1854, or under Act X of 1841." In these cases the section requires notice to be given of any such occurrences.

By section 4.—"If in any such case a formal investigation appears to the Local Government to be requisite or expedient, the Local Government (whether such notice be given or not) may appoint a special Court, consisting of not less than two nor more than four persons, to make such investigation, and may fix the place for making the same.

"One of such persons shall be a Magistrate acting in or near the place where the investigation is made; another shall be some person conversant with maritime affairs. The other or others (if any) shall be conversant with either maritime or mercantile affairs."

Section 5 provides for investigations into charges against holders of Board of Trade certificates.

1879

In re "AVA" AND "BERENHILDA."

Judgment.

WILSON, J.

By it.—"Every Court having Admiralty Jurisdiction in India and the principal Court of Ordinary Criminal Jurisdiction at every port of British India where there is no Court having Admiralty Jurisdiction, is hereby authorized, at the instance of the Local Government, or of such officer as the Local Government may have empowered in this behalf, to investigate charges of incompetency or misconduct on the part of any master, mate, or engineer of any ship, who holds a certificate granted by the Board of Trade, or as to shipwreck or other casualties affecting ships."

"Every such Court may, if it think fit, constitute as its assessor for the purposes of the investigation any person conversant with maritime affairs and willing to act as such assessor."

"Such person shall attend during the investigation, and deliver his opinion in writing to be recorded on the proceedings. But the decision of the case shall rest with the Court."

The other sections material to be considered are sections :—

By section 6.—"If the Local Government has reason to think that there are grounds for charging any master, mate, or engineer holding a certificate granted by the Board of Trade, with incompetency or misconduct, it shall transmit a statement of such grounds to the Court making the investigation."

By section 7.—"If the investigation involves a charge of incompetency or misconduct against any person holding such certificate as aforesaid, the Court shall, if practicable, before commencing the investigation, cause the holder of such certificate to be furnished with a copy of the statement transmitted by the Local Government as aforesaid."

By section 8.—"For the purpose of the investigation the said Court, so far as relates to compelling the attendance and examination of witnesses, and the production of documents and the regulation of the proceedings, shall have the same powers as if such investigation were a proceeding relating to an offence or case of complaint upon which the said Magistrate has power to convict."

By section 9.—"If, in the course of an investigation under this Act, by any of the Courts hereinbefore mentioned, it appears that there are grounds for charging with incompetency or misc[illegible]

older of such certificate as aforesaid, not so charged by the Government, the Court may cause a statement of such ds to be furnished to such holder, and may then commence vestigation into such charges of incompetency or mis- ct."

section 10.—"For the purpose of such investigation such may summon the master, mate, or engineer to appear, and give him full opportunity of making a defence, either in per- otherwise, and may summon and examine witnesses."

section 11.—"The Court shall in all cases transmit to the Government a full report of the conclusion at which it has d."

section 12.—"If the Court decide that any such certificate resaid shall be cancelled or suspended, it shall so state in Court, at the conclusion of the case or as soon afterwards sible."

section 13.—"When the Court decides to cancel or suspend ificate, it shall send a full report upon the case with the evi- , and the suspended or cancelled certificate through the Local nment to the Board of Trade."

section 14.—It is provided that no certificate shall be can- or suspended—

"Unless the person holding the certificate has before the encement of the investigation been furnished with a copy of atement of the case upon which the investigation has been d."

"If the Court be a Court of Admiralty or Ordinary Crimi- risdiction, unless the report be confirmed by the Local Go- ent."

"If the Court be a Court of Admiralty or of Ordinary nal Jurisdiction, attended by an Assessor, unless the or expresses his concurrence in the report."

, under section 5, it seems clear at first sight that this Court, ourt having Admiralty Jurisdiction, has authority, at the of the Local Government, to investigate charges such as ent.

, however, been argued broadly that this is not the case. odroffe contended that sections 3 and 4 are the governing

1879

In re "AVA" AND "BERENHILDA."

Judgment.

WILSON, J.

sections of the Act, section 3 determining the matters that may be investigated, section 4 the tribunal which is ordinarily to investigate them; that section 5 is in a sense parenthetical, empowering the Local Government, in case of need, to substitute an Admiralty or Criminal Court for the special Court provided by section 4; and that all the later sections apply only to enquiries within the scope of sections 3 and 4.

I cannot agree in this construction. It would run counter to the whole course of the legislation on these subjects both in England and in India. Investigations into the conduct of persons holding certificates and enquiries into wrecks and casualties have always been treated as different things. It would equally do violence to the language of the section itself; which, following the language of the earlier law on the same subject, and differing entirely from that of sections 3 and 4, speaks of investigations into charges of incompetency or misconduct.

Further, Mr. Woodroffe's construction would lead to the somewhat serious result, that, however grave might be the reasons for imputing misconduct or incapacity to the holder of a Board of Trade certificate navigating in Indian waters, the Local Government could not interfere to prevent disaster, but must wait till a catastrophe has actually occurred.

It was sought to strengthen the argument against the jurisdiction by the contention that the investigation, if held, must be fruitless, inasmuch as no power was given to suspend or cancel the certificates of the person charged. I do not think this so.

I think section 242 of the Merchant Shipping Act, 1854, followed by section 23 of the Act of 1862 confers the power on such Court as may for the time being be authorised by the local legislature to enquire into charges of misconduct. And accordingly, the Indian Act gives this Court the power to hold such inquiries, but does not confer in terms any power to cancel. It assumes the existence of the power, and goes on to prescribe the mode and the conditions of its exercise. In my opinion, section 5 does authorise this Court to investigate charges of incompetency or misconduct against holders of Board of Trade certificates totally distinct from any power in any

nal to enquire into wrecks or casualties. The more general tion to the jurisdiction must, therefore, fail.

fore leaving this part of the subject, I think it right to a view contended for by the Advocate-General. He d that all the sections in Chapter II of the Act subsequent tion 5 apply only to enquiries under section 5; and that Courts mentioned in that section are the only Courts that ncel a Board of Trade certificate, or report so as to enable cal Government to cancel its own certificate. In this I do not concur. It is at variance with the whole previous of legislation; and it does great violence to the language e sections in question. I think those sections apply, as anguage indicates, to both Courts, except so far as some m in terms apply specially to one or the other. And I ain no doubt that a special Court inquiring into a casualty section 4 has power, if all the provisions of the Act ly complied with, to cancel a Board of Trade certificate, nake a report to the Local Government upon which the nment can cancel its own certificate under section 18.

urther objection was taken that what was stated in the n as to the place of the collision excluded, or at all events sufficient to found, jurisdiction in the Court. The mis-ct charged is in connection with a collision stated to have ed in the "Bay of Bengal." It was urged that the res-n as to place expressed in section 3 in which (except in the f ships registered in India) the casualties which can be d into must have occurred "on or near the coast of " is to be imported into section 5.

not think this is so. I have already shown that section 5 from a different root from sections 3 and 4, and belongs to ct branch of legislation. In none of the previous sections, h or Indian, dealing simply with the investigation of of misconduct against holders of certificates, has the tion been made to depend on the place of the alleged ct, and the present section uses the same language. limitations of the jurisdiction are easily to be gathered Act itself.

y section 5, the person charged must be the holder of a

1879

In re "AVA" AND "BRENHILDA."

Judgment.

WILSON, J.

Board of Trade certificate. Secondly, by section 10 he must be summoned; he must therefore be at the time within the local limits in which the process of the Court can be served. There is a third practical limitation prescribed, not by the terms of the Act, but by the necessity of the case. The investigation can, of course, only be held where evidence is procurable.

An argument was, however, founded upon the subsequent words of the section, "or as to shipwreck or other casualties affecting ships." It was said that these words send us back to section 3, and import the local restrictions of that section into section 5. The words referred to are undoubtedly very difficult to construe, but I do not think they have the effect suggested. It is easy to see how they found their way into the Act; they are derived from section 242 subs. (5), of the Merchant Shipping Act, 1854. Section 241 of that Act provided for the trial of charges of misconduct, duly limiting the jurisdiction by reference to the parties charged, holders of Board of Trade certificate. Section 432 of the same Act provided for enquiries into wrecks and casualties, limiting the jurisdiction more or less clearly, mainly by reference to the place of the occurrence.

The Imperial legislature, assuming that local legislatures would in like manner provide for both classes of enquiries, enacted in section 242 that the Board of Trade might cancel certificates upon the report of "any Court or tribunal authorised by the legislative authority in any British possession to make inquiry into charges of incompetency or misconduct on the part of masters or mates of ships, or as to shipwrecks or other casualties affecting ships." The Indian Acts of 1861, 1863, and 1875, with more attention perhaps to the words than the meaning of this section, have empowered Admiralty and Criminal Courts to investigate charges against holders of certificates "or as to shipwreck or other casualties affecting ships," without, in the latter case, defining the jurisdiction in any way whatever, though the same legislature dealing with inquiries by special Courts has defined the like jurisdiction by reference to place or the character of the ship, both in the Act of 1859 and the present Act. Some restriction must be put upon the words to satisfy the well-known rule of construction, that the Acts of any legislature *primâ facie*

y to persons, things, or subject-matters, within its jurisdiction, to those without, and to avoid manifest absurdity. But the restriction should be is not easy to say. It is possible the words mean wrecks and casualties of the kinds otherwise e the subject of inquiry, that is, those mentioned in the er sections. It may be—and this I am inclined to think is ase—that these words are limited by those that go before, that Admiralty and Criminal Courts can under this Section ire into wrecks and casualties only when connected with ges of misconduct against holders of Board of Trade certificates. not, however, necessary to decide this. What is necessary is y that, in my opinion, whatever the meaning of the words hey do not restrict the jurisdiction given by those that go e.

it had been necessary to give jurisdiction that the matters uestion should have occurred on or near the coast of India, ink the words in the "Bay of Bengal" would have been too

And I should at least have required further information e proceeding with an inquiry. But statements were made gument as to the actual place of the collision. And I wish uard against suggesting any doubt that the collision did in ccur near the coast of India within the meaning of the Act, y doubt that the inquiry which has already been held was rly held.

is next contended that the jurisdiction of this Court is d by reason of what took place upon the former inquiry. regard to that, all that appears is on the face of the ion itself. It states that "upon the arrival of the said sailing (*i.e.*, *Brenhilda*) in Calcutta, an investigation was directed he Lieutenant-Governor of Bengal to be held into the mstances of the said collision, and that such investigation made by a Court of inquiry, the proceedings thereof were ed to the Lieutenant-Governor, but no charges were pre- by the said Court against individuals."

ree with what has been contended for the mate of the *Ava*, ese are proceedings of a penal character, and that the principle applies to such cases, that a man who has been rged with an offence, and acquitted or convicted, cannot be

1879

In re "AVA" AND "BRENHILDA."

Judgment.

WILSON, J.

tried again for the same offence. But I do not think the facts of this case, so far as appears, bring them within the principle. I have already shewn that the two kinds of inquiry—those into wrecks or casualties, and those into charges of misconduct—are distinct from one another. An inquiry into wreck may become an inquiry into misconduct. It may do so, in the case of the holder of a Board of Trade certificate, in either of two ways. The Local Government, under section 6, or the special Court itself under section 9, may frame charges against such a person; he may be served with a copy of the charges and summoned to answer them. Unless this be done there is, in my opinion, no charge against him, he has nothing to answer, and is in danger of no penal consequences.

It must be observed that, besides the power of framing charges of misconduct and proceeding to try them, the special Court may also, under section 16, if the facts require it, commit any person for trial on a criminal charge. If the view contended for be sound, it would seem to follow that the fact of a special Court not having committed any person for trial, would be a bar to any criminal charge against any person whomsoever in connection with a casualty.

The inquiry of the special Court into a wreck seems to me closely analogous to a Coroner's inquest in case of death. The inquest may result in a criminal charge. But it could not be contended that, if it did not, no one could ever be criminally charged for the death.

I think, therefore, there is nothing on the face of the petition to show that the previous inquiry is any bar to that now asked for.

The remaining objections have to do with the procedure adopted in this matter.

It is said that the proceedings have not been instituted by proper authority, that under section 5 the application to the Court must be either by the Local Government itself, or by some officer in the permanent service of the Local Government having a general authority to institute such proceeding; whereas the Advocate-General is an officer of the Government of India, and holds no such general authority. I do not so read the section.

Advocate-General is an officer, and the petition states that he npowered by the Lieutenant-Governor to apply to the Court, this is all that the words of section 5 require. Moreover, is were not a good application by an officer, it sufficiently ars from the petition that the Court is put in motion at the nce of the Lieutenant-Governor, and that satisfies the Act. is said also, that the petition is wrongly intituled, inasmuch e Acts on which the jurisdiction depends are not referred to. was urged, and I think rightly, that, in penal matters, the ribed procedure must be strictly followed. But I find ing in the Act requiring the application to be made in any ribed form of words.

was further contended that sections 6 and 7 of the Act have been compliod with, that a sufficient "statement of the nds" for charging the persons involved has not been trans-d to the Court, or furnished to them.

hat has taken place is this :—A petition was presented to the t by the Advocate-General on behalf of the Lieutenant-rnor, with the charges against the persons implicated an-l to it. They state the fact of the collision between the two , the *Ava* and *Brenhilda*, and the particular acts of miscon-and incompetency alleged against each person. I think what een furnished is as much as under sections 6 and 7 the Local rnment is required to transmit to the Court, and the Court persons charged.

veover, if these documents were insufficient, I do not think bjection would be one to jurisdiction strictly : that is to say, ot think the transmission of the statement is a condition dent to the Local Government's applying to the Court or to ourt's ordering an investigation; though the omission l be good ground for not commencing the investigation until made good.

there are two other sections to be considered, sec-, sub-section (*b*) of the Merchant Shipping Act, nd section 14, sub-section (*a*) of the Indian Act in . The first says that "no certificate shall be d or suspended under this section unless a copy of the a statement of the case upon which the investigation

1879

In re "AVA" AND "BRENBILDA."

Judgment.

WILSON, J.

is ordered, has been furnished to the owner of the certificate before the commencement of the investigation." The second says that no certificate shall be cancelled or suspended "unless the person holding the certificate has before the commencement of the investigation been furnished with a copy of the statement of the case upon which the investigation has been ordered."

The conditions of both sections are, in my opinion, binding upon this Court. The point does not go strictly to jurisdiction, but if there be a failure to comply with either section, no certificate can be cancelled or suspended. I further think that the word, "ordered" in the sections, means not ordered by any Court, but ordered, in England, by the Board of Trade, in India by the Local Government.

Now the section of the Merchant Shipping Act, which I have read, requires that, before the inquiry commences, "a copy of the report or a statement of the case," upon which the investigation has been ordered should be furnished to the persons charged, which means, in my judgment, a copy of the report, if it be a report, a statement of the case, if the case be not embodied in a report. In this case, it appears on the face of the petition that the proposed inquiry was ordered by the Lieutenant-Governor, upon the ground of the report of a special Court. I think therefore that the furnishing of copies of that report to the persons charged before the investigation commence is a condition precedent to the Court's cancelling or suspending their certificates.

The result is that, in my opinion, the objections to the jurisdiction fail; that the Court has power to make the investigation asked for, and that it should be held accordingly. But I also think that it would be a futile inquiry, and could not usefully be held, unless the condition I have mentioned be complied with, if it has not been done already.

[ADMIRALTY JURISDICTION.]

IN THE MATTER OF A COLLISION BETWEEN THE "AVA" AND THE "BRENHILDA" (2.)

1879
Aug. 8th.

IV of 1875, *sections* 5 *and* 14—*Investigation, Conditions precedent to—Evidence Act (I of* 1872) *sections* 65, 74, *and* 114—*Certificate of Board of Trade—Public Document—Secondary evidence of possession of Board of Trade Certificate.*

It is a condition precedent to an investigation under section 5 of Act IV of 1875, into charges of incompetency or misconduct that a copy of the statement of the case upon which the investigation was ordered, should have been served as required by section 14 of that Act upon the person whose competency or conduct is impugned, and also that such person should have had a certificate from the Board of Trade.

A Board of Trade certificate, of which a duplicate is kept by the Registrar General of Seamen, is not a public document within the meaning of section 74 of the Evidence Act (I of 1872).

Where such a certificate was lost, and evidence was tendered that it was a Master's certificate of a particular number and issued at Liverpool, *Held*, that the case was met by clauses (*a*), (*c*) and (*f*) of section 65 of the Indian Evidence Act; that, although under clause (*f*) only a certified copy was admissible, the subsequent words, "In cases (*a*), (*c*) and (*d*) any secondary evidence is admissible," were too clear and strong to be controlled by anything that followed, and that, accordingly, the evidence tendered was admissible.

Held also, that the evidence of the number of the certificate, and of the fact that it was a seaman's certificate, was sufficient for the purpose of an investigation under section 5 of Act IV of 1875.

Semble.—There is no difference beween a document which may be proved by a certified copy and a document which is a duplicate of such document.

[illegible] objections taken on the 20th of July, (the day fixed for the [illegible]tigation in this matter,) to the jurisdiction of the Court to [illegible]ed with the investigation into the charges of incompetency [illegible]misconduct preferred against T. W. Whittard, the Second [illegible] of the "Ava," having been over-ruled by Mr. Justice [illegible]on on the 28th July, as reported *ante* p. 307, the investi[illegible] was proceeded with by the Court on the 1st August.

1879

In re "AVA" AND "BRENHILDA."

Argument.

On the case for the prosecution being closed, Mr. Justice WILSON called attention to the fact that no proof had been given of service upon Whittard of a copy of the statement upon which the investigation was based, or of the summons and charges.

Thereupon, witnesses were called for the purpose of proving such service.

Evidence was given that Whittard was served with a notice to produce the original "certificate of the Board of Trade No. 10219." Captain Atkinson, the Marine Superintendent of B. I. S. N. Co., to which the "Ava" belonged, stated that Whittard had said to him, "the number of my certificate is No. 10219; it is a Master's certificate issued at Liverpool," but it did not appear when this statement was made.

The serving officer of the Court said that he had served certain documents on Whittard, but that he could not recollect what these documents were, or whether they were originals or copies.

An assistant from the office of the Government Solicitor on being called said that the papers which had been given over to the serving officer for service were copies of the reports of the Special Court, which had already sat, and that he had compared them with the originals. An affidavit was put in, dated 31st July, to the effect that a copy of the reports of the Special Court was served upon him.

The Attorney for Whittard, on being called, stated that he had been served with a copy of the summons, the petition of the Advocate-General, and a document marked "Charges," but that he had not been served with a copy of the report of the Special Court. He had obtained a copy made by his own writer on the 24th or 25th July, but whether that copy had been compared with the original he was unable to say.

Woodroffe, Jackson and *Henderson,* for Whittard.

J. D. Bell, (Officiating Advocate-General), *Phillips,* (Officiating Standing Counsel,) and *O'Kinealy,* for the Government.

Woodroffe.—It has not been proved, as it ought to have been, under section 14 of Act IV of 1875, that Whittard was served with a copy of the statement of the case under which this investigation has been held.

1879

In re "AVA" AND "BERNHILDA."

Argument.

' the report of the Special Court be such statement, the only ' of that report which has been received is a copy made by a er from his Solicitor's office and not proved to have been pared with the original, and that copy was not obtained until 24th or 25th, some days after the beginning of this investiga-

That a copy should have been served is a condition pre-nt to this enquiry.

hen, there is no proof that the accused holds a certificate of Board of Trade, and that being so, this Court has no jurisdic-

. The only evidence is, that Whittard stated to Captain nson that the number of his certificate was No. 10219, and it was a Master's certificate issued at Liverpool. A mere ription cannot be taken as legitimate proof of the contents he document.—See the Evidence Act, section 22, which over-s the English rule laid down in *Slatterie* vs. *Pooley*, 6 M. and 664.

nder section 138 of the Merchant Shipping Act of 1854, a icate of every certificate is kept and recorded by the Regis-of Seamen. Therefore the duplicate is a public document, in the meaning of section 74 of the Evidence Act, as being a rd of an official body, viz., the Board of Trade.

Moreover, under Act IV of 1875, section 13, the suspended or elled certificate has to be sent with the evidence and report, order that a corresponding entry may be made upon the licate.

gain, a Board of Trade certificate comes within clauses (e) (f) of section 65 of the Evidence Act, and only a certified r can be allowed as secondary evidence. See section 138 of Merchant Shipping Act, 1854.

. copy of a copy not being admissible in evidence, unless that r has been compared with the original—section 63, *à fortiori* ral statement of the contents of a document is no evidence.

aptain Atkinson's statement only amounts to a statement Whittard had told him that he had a certificate.

[WILSON, *J.*—Suppose a document coming under clauses (e) (f) is shown to be in the possession of a person against whom ought to be proved, would it then come under clause (a) of n 65 ?]

1879

In re "AVA" AND "BERNHILDA."

Judgment.

No. The section goes on to say that in cases (e) and (f) no secondary evidence but a certified copy is evidence.

This case being in the nature of a criminal proceeding, the requirements of the law must be strictly complied with—*Reg.* vs. *Bholanath Sen*, I. L. R., 2 Cal., 23; see also the remarks of COCKBURN, *L.C.J.*, in *Martin* vs. *Mackonochie*, L.R. 3 Q.B.D., 730.

J. D. Bell, (Offg. Adv.-Genl.)—The certificate, which must be assumed to have been in the possession of Whittard, is not a public document. Besides, it is contrary to the intention of the Legislature that there should, in all such enquiries as this, be an application to the Board of Trade to produce the duplicate certificate. I admit we have not given sufficient evidence of the loss, but I contend that, under section 114 of the Evidence Act, there is sufficient proof of possession; for there is evidence that Whittard came out as Mate of the "Ava," and if he had no certificate he would be liable to a penalty under section 136 of the Merchant Shipping Act, 1854. In that case clause (a) of section 65 of the Evidence Act would be applicable.

Woodroffe, (in reply).—It being admitted that sufficient evidence of the loss has not been given, the case cannot come under clause (c) of section 65 of the Evidence Act.

Section 114 has no applicability—see illustrations.

The Advocate-General has no right to assume, even under section 136 of the English Act, that the certificate was in Whittard's possession in order to bring the case within clause (a) of section 65 of the Evidence Act. It was not contended that (e) and (f) applied.

The duplicate, I contend, is a duplicate original, and no secondary evidence can be given—see section 64 of the Evidence Act.

There is no evidence of the time when Whittard made the statement spoken of by Captain Atkinson.

The following judgment upon the objections taken on behalf of the Second Mate of the "Ava" was delivered by

WILSON, *J.* WILSON, *J.*:—

Mr. Woodroffe has raised two objections, in respect of which he contends that the Advocate-General has not produced sufficient

idence to allow the Court to proceed with this investigation. e of these objections goes not strictly to the jurisdiction, but the power of taking any effective action. It is that a copy of statement of the case upon which the investigation was lered has not been served upon Whittard, the Second Mate of "Ava," as required by section 14 of Act IV of 1875.

It is apparent that the report of the Special Court is the statent of the case referred to in section 14. There is nothing on record to suggest that there was any other statement. It ms from the affidavit of 31st July that a copy of the report served upon Whittard. I think, therefore, that a copy of statement of the case was served in compliance with the terms section 14.

Then it is suggested that the statement ought to have been nished before the investigation was ordered; but it seems to this is too strict an interpretation of the words of the section. lo not think that up to the 1st of August any investigation commenced. This further contention, therefore, fails.

The second objection is not so easily dealt with. It is admity a condition precedent to the investigation that the person se competency or conduct is to be enquired into, should have rtificate from the Board of Trade.

ection 65 of the Evidence Act says :—(the learned Judge here ted the section.)

low it has been shown that coming out to India, the Second te must have had a certificate. Whittard stated to Captain inson, the Marine Superintendent of the B. I. S. N. Co., to ch the steam ship "Ava" belonged, that he had a certificate, igh Captain Atkinson was not sure whether it was from the rd of Trade.

should be inclined to hold on the evidence that the certificate t down with the "Ava," and that the case was met by se (c) of section 65 of the Evidence Act. It has, however, been iently shown that it comes under either clause (a) or clause (c). ce to produce it has been given, and therefore secondary ence may be taken as to its contents. It is necessary to look clauses (e) and (f), which purport to give additional cases ch secondary evidence may be given.

1879

In re "AVA" AND "BRENHILDA."

Judgment.

WILSON, J.

Clause (e) deals with public documents. Section 74 says the following documents are public documents, viz.:—(1) documents forming the acts or records of the Acts of (i) of the sovereign authority; (ii) of official bodies and tribunals; (iii) of public officers, legislative, judicial and executive; (2) public records, kept in British India, of private documents.

Now it does not seem to me that this certificate is a public document. I do not say that the duplicate kept by the Registrar General of Seamen under section 138 of the Merchant Shipping Act, 1854, is not a public document. If the certificate were a public document, then very many documents would be made public documents which were not intended to be such, *e.g.*, a hundred-rupee note.

Sub-section (f) of section 65 of the Evidence Act says:—"Secondary evidence may be given when the original is a document, of which a certified copy is permitted by this Act or by any other Law in force in British India, to be given in evidence."

To estimate the bearing of this section we must turn to section 138 of the Merchant Shipping Act of 1854, Vict. c. 104, but although, for many purposes that Act has force in India, I doubt whether the rule of procedure in that section applies, namely that a certified copy shall be evidence of such certificate. But whether or not the words apply in India, that duplicate would, I think, be a public document within the meaning of section 74 of the Evidence Act, and under section 65 any such document may be proved by a certified copy. Therefore the certificate might be so proved unless there be a difference between a document which may be proved by a certified copy and a document which is a duplicate of such document. This is a point of some difficulty, but I should be disposed to say there is no difference, and that the case falls under clause (*f*).

This brings us to the real question—What kind of secondary evidence is admissible. By section 65, in cases under clauses (b) and (c) any secondary evidence is admissible, in cases under clause (f) only a certified copy. The present case falls under (b) or (c) and also under (f). In such a case which rule applies?

1879

In re "AVA" AND "BRENHILDA."

Judgment.

WILSON, J.

think the words "In cases (a) (c) and (d) any secondary evidence is admissible" are too clear and too strong to be controlled by anything that follows, and that therefore in this case any secondary evidence might be received.

Mr. Woodroffe pointed out that clause (*c*) might apply to a judgment lost, when a certified copy might be, but was not produced. I admit the difficulty, but I think danger might be avoided by sufficient caution being exercised.

If effect were given to the other view irreparable injury would result in case of the accidental loss of the record of a court.

Mr. Woodroffe has submitted that no sufficient evidence has been given of the existence at any time of a certificate or of the contents. I agree with him that there is a distinction between evidence for the purpose of identification and evidence to enable the court to ascertain the contents of the document.

We must, however, look to see how much of the document is wanted. In the case of a Government note, for example, it might, in some cases, be sufficient to give the number or the amount.

For our present purpose all we want to know is, whether there was a Board of Trade certificate identified by a number.

Now there is evidence that it was a master's certificate; that was issued at Liverpool and bore a certain number. I know no such certificate but a Board of Trade certificate. Therefore there is sufficient evidence that it was a Board of Trade certificate.

[CIVIL APPELLATE JURISDICTION.]

1879 *Sept.* 11*th.*

No. 763 of 1878.

GOPAL CHUNDER ROY (PLAINTIFF) . . . APPELLANT;

AND

BROJENDRO COOMAR ROY (DEFENDANT) . RESPONDENT.

Arbitration Award—Partition—Right of way—Easement of necessity.

Where the house and lands of a joint Hindu family were partitioned by the Court according to an award made by an arbitrator to whom the parties had agreed to refer the matter, *held*, in a subsequent suit that the Court could not go behind the award and allow one of the members of the family to claim a right of way from the family house to a public road, through the lands allotted by the award to another member, such right of way not having been granted by the award, and there being no such right of way of necessity.

APPEAL from a decision passed by the Subordinate Judge of Nuddea, reversing the decree of the Moonsiff of Ranaghat.

In this case the plaintiff and the defendant, and one Monomohiny, as members of joint Hindu family, had been in the enjoyment of their family house and homestead lands, but a quarrel having arisen, Monomohiny sued the others for partition. By mutual agreement the matter was referred to arbitration, and a decree was given in terms of the award made by the arbitrator. The arbitrator divided the house and lands into three lots and assigned the northern to the present plaintiff, the middle to the present defendant, and the southern to Monomohiny. Before the partition the sudder road to the house from the public road ran through the land assigned to the plaintiff; and upon the original plan of the property used by the arbitrator, and coloured by him for the purposes of his award, the words "Sudder Rastha" represent this Sudder Road; and upon the same plan in other parts if it, such words as "yard," "plantain garden," represent the state of the property before partiton. The owner of the middle lot now claimed the right to use this road, and the present suit was brought to restrain him from so using it.

The Moonsiff before whom the suit was heard in the first instance, decided that the defendant had no right of way over the

1879

GOPAL CHUNDER ROY v. BROJENDRO COOMAR ROY.

Judgment.

l allotted to the plaintiff. On appeal, however, to the Subor-
ıte Judge this decision was reversed. Whereupon this second
:al was preferred to the High Court.

aboo *Gurudass Banerjee*, for the Appellant.

aboo *Hem Chunder Banerjee* and Baboo *Kashee Kant Sein*,
:he Respondent.

he judgment of the High Court (1) was as follows:—

: appears that a partition suit had been instituted, in which
parties to this suit were both defendants. In that suit
rence was made to an arbitrator to divide the land into three
between the plaintiff and the defendants in the suit. The
trator prepared a map of the property, and divided it into
e lots, one of which he colored yellow, another red, and
her, he says, green, but it really appears to be blue in his
. He directed that the lot colored yellow should be held
the plaintiff in that suit, that the lot colored green should be
n by the plaintiff in this suit, and that the lot colored red
ıld be held by the defendant in this suit. In making these
:tions he stated what was the exact superficial extent of each
of these lots, and he directed certain payments to be made
'een the parties for inequality of exchange. Now, on the
which the arbitrator filed in that suit there is across the
le of the middle of the lot colored green a roadway on which
ritten the words "Sudder Rastha." It was the Sudder Rastha
ıe whole house previous to partition, and it extends to a
ic road, commencing from the part colored red, and the defen-
in this suit insists that it was intended by the arbitrator
hat partition suit that the owner of the part colored red
ld continue to enjoy the use of that Sudder Rastha.

ow, in the Moonsiff's Court, a decree was given in favor of
plaintiff, denying the use of this road to the defendant, but
ppeal to the Subordinate Judge, that decision was reversed,
e has held that the defendant is entitled to the use of
Sudder Road. We think that he has not acted properly in
behind the award filed by the arbitrator in the partition
That document is unambiguous, and it directs that the

(1) PONTIFEX and MCDONELL, *JJ.*

1879

GOPAL CHUNDER ROY v. BROJENDRO COOMAR ROY.

Judgment.

parties should enjoy the different lots allotted to them according to the superficial extent which is stated to be the amount of the respective lots. Moreover he has in two particulars stated how this lot colored green is to be enjoyed. He stated that with respect to a part of it, the drainage of part of the property colored red is to pass through it; and in respect to another part of it, that no wall was to be raised so as to interfere with the light, or air enjoyed by another part of the property colored red.

We are of opinion that we cannot go behind that award so as to give any of the parties in that partition suit different rights to those which clearly appear on the award. If this were a case where it would be impossible for the owner of the lot colored red to get to a public road except through the part colored green, then it might be necessary to hold that it was a way of necessity, and that the owner of the lot colored red might be entitled to enjoy it as of necessity. But no such case has been made. It is admitted, and is evident from the arbitrator's map, that a part of the plot colored red and also a part of the plot colored yellow, does open upon a public road. It is objected by the defendant that this opening on the public road is through a zenana or inner apartment, and that it could never have been intended by the arbitrator that his way to the public road should be through the inner apartment, and the inner apartment only. We think that ought to have been brought to the notice of the arbitrator. If the arbitrator did not intend it, he ought expressly to have stated the contrary, and the fact that the words "Sudder Rastha" appear in the map cannot operate further than the other words such as "yard," "plantain garden," &c., which also appear in the map. Moreover we see no reason why the owner of the lot colored red should claim the right of using this road more than the owner of the lot colored yellow, and we think it quite clear from the award of the arbitrator and his plan that it was never his intention that the owner of the lot colored yellow should have a passage through the lot colored red and the lot colored green. We think, therefore, that we must over-rule the decree of the Subordinate Judge, and that the judgment of the Moonsiff must prevail. According to the usual custom the appellant must have his costs.

[PRIVY COUNCIL.]

RAMASWAMI CHETTI . . . . . APPELLANT; 1879 *May 8th.*

AND

THE COLLECTOR OF MADURA. . . . . RESPONDENT.

Registration—Act XX of 1866, *section* 17—*Pottah within meaning of Madras Act VIII of* 1865.

A, having received large advances from B to enable him to carry on a protracted litigation, executed a lease of a village S., of which the annual value was Rs. 1,700, to B, in the following terms:—"In consideration of the assistance you have rendered you requested that the village of S. should be leased to you for forty years, fixing a favourable rent. The aforesaid village has accordingly been leased to you for forty years at Rs. 400 per annum. You shall therefore raise the required crop and enjoy, and agreeably to the *kararnamah* you have given, you shall continue to pay the fixed rent according to the instalments of kists year by year."

The lease was not registered.

Held, that the lease was not one granted for the purpose of bringing waste lands into Cultivation and therefore not a *pottah* within the meaning of section 3 of Madras Act VIII of 1865, and was, accordingly, void for want of registration under section 17 of Act XX of 1866.

APPEAL from a judgment passed by a Divisional Bench of the High Court of Judicature at Madras.

J. D. Mayne, for the Appellant.

Cowie, Q. C. and *Graham*, for the Respondent.

The facts will be found in the judgment of their Lordships the Judicial Committee (1), which was as follows:—

This was a suit brought by the Collector of Madura, acting for the Court of Wards on behalf of the minor zemindar of Ramnad, against the defendant, to recover possession of the village of Kilavai, and also to set aside a lease of that village, granted by the late zemindar of Ramnad, the minor's father, in the year 1868. The learned Counsel, on the part of the appellant, the

(1) Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

1879

RAMASWAMI CHETTY v. THE COLLECTOR OF MADURA.

Judgment.

defendant below, has not sought to impeach the judgments of the Courts below so far as they set aside the lease of 1870, but his contention has been directed to establish a former pottah which had been granted by the late zemindar to the appellant's father in the year 1867. It does not appear that the question, which has been argued at the bar, was the subject of decision in the High Court. The judgment of the District Judge of Madura proceeded upon the footing that the document of 1867 was inadmissible in evidence. It is an unregistered document made before the birth of the present plaintiff. The District Judge also held that the lease of 1870, which was registered, did not bind the minor plaintiff, inasmuch as it was granted after his birth, and upon considerations which did not support it against his inchoate title. Their Lordships feel regret and some surprise that the Judges of the High Court have given no reasons for their judgment; none have been reported to their Lordships.

The sole question which is now before their Lordships is whether the document of 1867, in consequence of its not having been registered, is admissible in evidence and effects the estate; the point for decision being whether it is a document that falls within the General Registration Act, XX of 1866.

The argument having turned entirely upon the effect of this Registration Act, which refers to a Madras Act, and upon the construction of those two Acts as applicable to the instrument, it is unnecessary to go into the previous history of the case. It is sufficient to say that the late zemindar of Ramnad was adopted by the widow of a former zemindar; that his adoption was disputed, and great litigation was the consequence of that dispute. The case ultimately came before this tribunal upon appeal, and a decision was given, in May 1868, in favour of the adoption. Considerable expenses were necessarily incurred, and the defendant's father, Arnachellum Chetti, and his partners, who appear to have been merchants and bankers, made very large advances to the zemindar and his agents for carrying on the legal proceedings. In 1867, when the document in question was granted, the advances amounted to about a lac and a half of rupees; and at the end of the litigation the further advances and accumulated interest amounted to very nearly four lacs of rupees. The mer-

chants who advanced the money took security for their advances, and in the end they received the whole of their money with compound interest, and several large sums by way of presents in addition to the interest.

The document on which the question arises is dated the 15th April 1867, and professes to be a lease from the late zemindar to Arnachellum Chetti. Its terms are these: "In consideration of the assistance you have rendered to this Samastanam (zemindary), you requested that the Kasba (chief) village of Salugai, Salugai division in Raja Singamangalam Firka should be leased to you for 40 years, fixing in favourable *poruppu*." "The aforesaid Selugai village," describing it, "has been accordingly leased to you for 40 years from this Fasli 1276 up to Fasli 1315, fixing the *poruppu* at 400 rupees per annum." It may be stated, in passing, that it is found that the value of this village was 1,700 rupees per annum, so that it was obviously a favourable lease, which was intended to confer a valuable interest on the lessee. "You shall therefore, raise the required crops and enjoy; and, agreeably to the kararnama (agreement) which I have given, you shall continue to pay the fixed *poruppu* according to the instalments of kist year after year."

This lease was not registered. It is the document upon which the defendant now relies to resist the claim to the possession of the village made on the part of the minor zemindar; for, as has been already stated, it is not now contended that the judgments below with regard to the lease of 1870 can be impeached.

It is necessary to refer shortly to Act XX of 1866, though the main question arises upon the Madras Act VIII. of 1865, to which reference is made in it. By the 17th section of Act XX, "leases of immoveable property for any term exceeding one year" are required to be registered. The interpretation clause (sec 2,) says of the word lease." "Lease includes a counterlease, a kabulyat, an undertaking to cultivate or occupy, an agreement to lease, but not a potta or muchalka, as respectively defined in section 3 of Act VIII of 1865 of the Governor of Fort St. George in Council executed in the Madras Presidency." It is contended on the part of the defendant that this document is a pottah as defined in section 3 of this Act.

1879

RAMASWAMI CHETTI v. THE COLLECTOR OF MADURA.

Judgment.

The preamble of the Madras Act is as follows :—"Whereas it is expedient to consolidate and simplify various laws which have been passed relative to landholders and their tenants, and to provide a uniform process for the recovery of rent." Section 3 seems to be confined to the relations of tenants who are cultivating the land and their immediate landlords. The whole Act may not be confined to that class, but the intention appears to be by section 3, and the sections which specifically refer to it to regulate the relation of landlords and tenants of that description. This 3rd section, which is the one under which this document must be brought, if it is to escape the obligation of registration, is as follows :—"Zemindars, Shrotriemdars, Inamdars, and persons farming lands from the above persons, or farming the land revenue under Government, shall enter into written agreements with their tenants, the engagements of the landholders being termed potta, and those of the tenants being termed muchalka." It is said that this description embraces all cases where there is a landlord and a tenant. If that were the construction of the 3rd section as applied to the Registration Act, the consequence would be, that in Madras all leases would be excluded from the beneficial operation of that Act. However large the premiums that may have been given on such leases, however small the rent, if there be a rent at all, according to the contention on the part of the appellant, the lease would fall within this 3rd section, and therefore need not be registered. One class of those who are described as landlords as distinguished from tenants are persons farming lands from zemindars and others who are previously mentioned; but if the wide construction were to prevail, every lease from a zemindar to any such person intermediate between the zemindar and the ryots, would be a lease which need not be registered; and the mischief against which the Registration Act was intended to provide a remedy would exist in the case of all the valuable leases which are granted by zemindars to intermediate holders.

The reference in the Registration Act is to a "pottah or muchalka as respectively defined in section 3." This section of the Madras Act does not strictly contain a definition, but a description only. It appears to provide for what shall be done where

1879

RAMASWAMI CHETTI v. THE COLLECTOR OF MADURA.

Judgment.

ere is an existing relation of landlord and tenant, and requires t the landlord shall in that case enter into a written engage- nt with his tenant. Following the provisions of the Act, remedies which are given in sections 8 and 9 can only be ilable where the relation of landlord and tenant, or a holding some sort, already subsists, upon the basis of which the land- l or the tenant, as the case may be, may come into Court claim to have a lease granted. Section 8 is, "when any of landholders specified in section 3 shall, for three months r demand, refuse to grant such a potta as his tenant was tled to receive, it shall be lawful for the latter to proceed by g a summary suit before the Collector, who shall try the and direct a proper pottah to be granted. Under section 9, landlord may in like manner compel the tenant to accept oper pottah. These provisions are made upon the assump- that there is no existing relation which would warrant the lication by either party for a written pottah. It cannot, of se, be contended that in this case the zemindar was bound rant a lease of 1867, or any lease to Arnachellum Chetti. other provisions of the Act are consistent with this con- ction of section 3, sections 5, 10, 11, and 12 refer specifically he class of landlords described in section 3; whilst section refers to other classes, showing that section 3 was not intend- o apply to all classes of persons holding under others, but particular class of landlords and tenants only.

further question was raised in the first instance before the trict Judge, *viz.*, whether, supposing the document of 1867 a pottah within the meaning of the Madras Act VIII, 5, the proviso which is found at the end of section 11 would nullify its effect as regards the respondent, the "successor" he grantor. There seems to be ground for the contention this proviso is not limited to cases where suits are brought the 8th, 9th, and 10th sections, although the commence- of the 11th section refers to such suits. The commence- s: "In the decision of suits involving disputes regard- s of rent which may be brought before Collectors under s 8, 9, and 10, the following rules shall be observed," and ome four rules. Three of them appear to apply to such

1879.

RAMASWAMI CHETTI v. THE COLLECTOR OF MADURA.

Judgment.

suits, but it may be doubtful whether clause 4, which relates to waste lands, is so confined. Then the proviso referred to is:— "Provided also no pottahs, which may have been granted by any such landholder at rates lower than the rates payable upon such lands, or upon neighbouring lands of similar quality and description, shall be binding upon his successor, unless such pottah shall have been *bonâ fide* granted for the erection of dwelling houses, factories, or other permanent buildings, or for the other purposes mentioned in the proviso." It is difficult to suppose that the operation of this proviso was intended to be confined to cases in which suits are brought under section 8 or 9; and it may be that it was intended to apply to all pottahs which come within the 3rd section. If so, the appellant, assuming the respondent to be a successor within the meaning of the proviso, would be placed in the difficulty which induced his advocates, at the first hearing before the District Judge of Madura, to take the opposite view from that which his counsel has taken to-day, and to contend that this document was not a pottah within the meaning of the Madras Act, a view which was upheld by the Judge. It is not, however, necessary to decide this point.

On the whole, therefore, their Lordships are of opinion that this appeal fails, and they will humbly advise Her Majesty to affirm the decrees of the Court below, with costs.

[PRIVY COUNCIL.]

AMASAWMI AIYAN AND OTHERS . . . . APPELLANTS; 1879

AND

ENCATARAMA AIYAN . . . . . RESPONDENT.

Hindu Law—Adoption—Agreement by natural father—Ratification.

An agreement by the natural father that his son should be adopted by a widow on the understanding that he should inherit part only of the estate of the deceased husband is not void, but may be ratified by the son upon his attaining majority.

[Decision of the High Court at Madras reversed.]

PPEAL from a judgment of a Divisional Bench of the High ourt of Judicature at Madras, reversing the decree of the Subor-inate Judge of Trichinopoly.

The facts are sufficiently stated in the judgment of their ordships of the Judicial Committee (1), which was as follows :—

The facts of this case material to its decision are as follows :— ngasawmi Aiyan was the youngest of three brothers of a int Hindoo family. The eldest brother died in the year 1858, aving a widow named Thy Ammal. On his death, the two maining brothers made a partition of the property to which ey were entitled. The second brother died in 1860, leaving widow named Lakshmi Ammal. Rangasawmi had a wife, the ughter of Ramasawmi, who was his cousin, and was the ther of Thy Ammal. Rangasawmi, having no children on e 19th January 1861, executed the following documents :—

Agreement executed on the 19th January 1861, by me, Ran-awmi Aiyan, son of Subba Aiyan, residing at Minakshipuram, the Trichinopoly Taluk, while in the possession of sound d, in favour of Ramasawmi Aiyan, son of Ananta Krishna an, residing at Kulumani in the said taluk, to wit :—

In the villages of Minakshipuram aforesaid, Gouripuram, ppulatturai, Analai, Rangachchipuram, Elumanur, Anta-

(1) Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

1879

RAMASAWMI AIYAN v. VENCATARAMA AIYAN.

Judgment.

mallur, Ammangudi, Kulumani, Mulangudi, Tachchangudi and Kottattai, I hold some property. Besides, in respect of the moveable and immoveable property standing in the names of Lakshmi Ammal, the widow of Visvanadha Aiyan, my elder brother, and others, I brought a suit in No. 5 of 1860, on the file of the Civil Court, which is now pending in appeal before the Sudder Court in No.——of 1860. My present state of health is, however, too bad to permit me to manage and take care of the said (last mentioned) property, as well as the said (first mentioned) houseground, houses, cattle, &c., &c. Besides I have no issue, and have consequently adopted your son Krishnasawmi this day according to law. You shall, therefore, yourself manage the affairs of all the moveable, and immoveable property, &c., except three cheis of land constituting two shares in the village of Kulumani, which I have given away to my elder sister Tayi Ammal, as manjakani (land granted for expenses), pay the Government revenue, &c., assessed thereon, render the necessary assistants in the interests of the said suit, and maintain my adopted son aforesaid. Besides, you should deliver up to the two persons aforesaid so soon as my said adopted son attained his age, all the said moveable and immoveable property, and all the other property, save such as might have been legitimately suspended till then. Furthermore, you should administer the charity of distributing boiled rice, &c., at my house in the village of Minakshipuram, and by applying therefore the incomes derivable from the wet and dry lands of that village left after paying the expenses, Government revenue, &c., keeping an account of the receipts and disbursements in that matter, and you should with Krishnasawmi, my adopted son aforesaid, after he attained his age, and Lokambal, my wife, these two to administer the charities in perpetuity, and in a manner allowing no scope for any shortcomings.

"You should also, while thus acting, and until my son attains his age, look after the duties of the office of manager, which I hold in my name with respect to the Tiruppulatturai pagoda.

"To this effect, I, Rangasawmi Aiyan, execute the agreement in favor of Ramasawmi Aiyan."

In pursuance of this instrument the child therein men-

pted, and Ramasawmi undertook the management of the

ıe 9th February 1861, Rangasawmi executed the following
nt, which is termed in the record a muktiarnamah.
iarnamah (general power-of-attorney) executed on the
ruary 1861, by Rangasawmi Aiyan, son of Subba Aiyan,
at Minakshipuram, in the Trichinopoly taluk, in favor
ısawmi Aiyan, son of Ananta Krishna Aiyan, residing the
of Kulumani in the said taluk, to wit:—At present the
my health is not satistactory, and I have no issue.
, for the management of my own immoveable property
am in the enjoyment of, for the conduct of the suit which
ght in No. 5 of 1860, on the file of the Civil Court against
ıi Ammal, the widow of Visvanadha Aiyan, my elder
, touching certain property, and which I have now brought
al in No. 25 of the same year, on the file of the Sudder
and for the looking after of my adopted son, Krishnasawmi,
my wife and myself, I have no friend to look up to but
f. You should, therefore, look after us as mentioned above,
d all my property according to your pleasure and manage
ıe. If the said Sadr Appeal, No. 25, should also terminate
me, you should take upon yourself and manage the dry
et land forming the 11 pangus (shares) in the village of
hipuram, the 4 pangus (shares) in Anaila, 1 pangu (share)
ppulatturai, and 1 pangu (share) in Tachchangudi, 1 house-
in Kulumani, out of the property in my possession, and
t concern in the profit or loss therefrom arising, make the
ver to my adopted son after he attained his majority. Be-
ıs I have consented to Thy Ammal, the widow of my elder
, Venkatarama Aiyan, making an adoption, which she is
ting to do in accordance with the authority given by my
rother aforesaid, you should get my wife to give up out of
operty to the said Ammal (lady) the one-third share of my
rother aforesaid, a dwelling house, 1 Machchupatti house-
cattle, ploughs, &c., all in a group, with liberty to alien-
ame by sale, and to appropriate the same according to her
ure. The remaining lands you should get my wife to
of by sale in satisfaction of the debts contracted by

1879

RAMASAWMI AIYAN v. VENCATARAMA AIYAN.

Judgment.

me for the family expenses and for the costs of the said suit, and clear off my debts in full. You are at liberty yourself to demand and recover the sundry debts due to me. All prior documents of any kind, whatsoever, referring to the above subject shall become null. I have thus, with my full consent, executed to you this muktiarnamah (general power-of-attorney)."

The High Court of Madras, of whose judgment some notes, obviously very imperfect, are to be found in the record, appear to have treated this document, which was not registered, as open to much suspicion. It may be, but inasmuch as it has been found to be genuine by the lower Court, before which some of the attesting witnesses were called, while no evidence directly impeaching it was produced, their Lordships find no sufficient grounds for disbelieving its execution, or setting it aside as invalid.

Rangasawmi died in 1861 not long after the execution of this document, but the precise date of his death does not appear.

On the 10th June 1862 the widow of Rangasawmi, Lokambal, assuming to act under the directions of the muktiarnamah, executed a release to Thy Ammal of what may be described in general terms as one-third of the family property.

On the 23rd June 1862 Lokambal, assuming to act under the same authority, executed three deeds of sale, to one Vamana Aiyan, of what may be described in general terms as another one-third of the property for advances alleged to have been made to her for the payment of her husband's debts.

It appears that the property conveyed to Thy Ammal found its way, after some interval, into the hands of her brother, Ramasawmi, and that by the last three deeds Lokambal, in effect, conveyed the property to which they refer to Ramasawmi, her father, who admits the sale to the nominal purchaser to have been benamee for him, alleging that he paid the consideration money, and that it was appropriated to the payment of the debts of Rangasawmi. Almost immediately after the execution of those deeds the adopted son died.

Thereupon the widow proceeded to make a new adoption under authority from her husband (as is now conceded), and with that object entered into the following agreement with one Muttu Aiyan for the adoption of his son, who is the plaintiff in this

"Agreement executed on the 23rd Ani of Dundhubhi, corresponding to the 5th July 1862, by Mutturama Aiyan, son of Venka Aiyan, residing at Dikshasamudram, otherwise known as Mullakudi in the Trivadi taluk, in the Combaconum district, a favor of Lokambal Ammal, the widow of Rangasawmi Aiyan, siding at Minakshipurmalpuram, in the Trichinopoly taluk, the Trichinopoly district, and Ramasawmi Aiyan, the authoized agent of the said Rangasawmi Aiyan, to wit:—

"After entering into a partition the said Rangasawmi Aiyan, dopted Krishnasawmi, a minor, and died some time afterwards; nd, some time after this, Krishnasawmi also died. Thereupon, ith a view to the fulfilment of the said Rangasawmi Aiyan's ish to make an adoption, I gave my son, Chidambaram *alias* encatarama Aiyan in adoption to the said Lokambal Ammal acrding to law, with my full consent. Excluding the sales of roperty made to third parties in satisfaction of the debts conacted by the said Rangasawmi Aiyan, and the absolute disposin of property made in favor of Thy Ammal, the widow of encatarama Aiyan, his elder brother, for her share, all of which ok place so far back as during the lifetime of the said minor, rishnasawmi, the said Lokambal Ammal is now possessed and the enjoyment of 11 pugus (shares) of wet land and the wet and samudayams appertaining thereto in Minakshiammalpuram oresaid, setting aside the houseground of Muttulinga Moodelr and the patti Manai lying to the west of it, of 1 punga (share) wet lands and the samudayams thereto appertaining in Tiruppatturai, setting aside the houseground of Pannai Setura an, of one of the housegrounds which fell to his share in the aharam of the village of Kulamani, of 1 pungu (share) in the age of Tachchangudi and of 4 pungus (shares) in the village nalai with the samudayams thereto appertaining. Beyond property which is in her possession, the said Ammal (lady) no property. Agreeing, therefore, to my begotten son lambaram *alias* Vencatarama Aiyan, who is the minor adopted above mentioned, being put in possession of the said proy, which now remains after he attained his majority, I have, my full consent, given my said son in adoption. I have, dore, executed to you this agreement to show that you alone,

1879

RAMASAWMI AIYAN v. VENCATARAMA AIYAN.

Judgment.

who are henceforth entitled to all sorts of rights until the adopted son aforesaid should attain his age, and competent to solemnize his wedding, and other auspicious ceremonies, should look after the said adopted son and the said property; that whether or not there is more property, neither I nor my begotten son, who is the adopted son abovementioned, have any sort of claim or title to the same, or to their enjoyment.

(Signed) "MUTTURAMA AIYAN."

It is in evidence that Mutturama Aiyan was informed that two-thirds of the property had been alienated, and was shown the muktiarnamah and the four deeds which have been referred to. Thus, if not distinctly informed of the true nature of the transactions, he was at the least put upon inquiry respecting them; it is not alleged, much less proved, that any fraud was practised upon him, and on his being called as a witness by both parties no question was put to him suggesting that he had been induced to make this agreement by any misrepresentation or concealment. Their Lordships, therefore, feel themselves bound to assume that the father consented to give his son in adoption on the understanding that he would inherit only about one-third of the late Rangasawmi's property, being aware or not caring to inquire how the remaining two-thirds had been disposed of. The legal effect of this proceeding will be dealt with hereafter. The plaintiff, shortly after he became of age, which time is found by both Courts to have been in 1869, executed a lease (dated 4th October 1869) to Nagana Anjan, a son of Ramasawmi, of all or almost all the lands to which he was entitled, for thirteen years, at a "Swamibogam" rent of Rs. 150 per annum; the lessee further undertaking to maintain the plaintiff and his adoptive mother.

This lease, which put him entirely in the power of Ramasawmi's son, or, in other words, of Ramasawmi himself, and which he certainly ought not to have been induced or even allowed to execute, he some time afterwards very naturally desired to set aside, and his adoptive family insisting on maintaining it, he left his adoptive mother's house, married, and went to live at the house of his wife's father. Although he returned once or more to his adoptive mother's house, it was when he was living in the house

his wife's father and surrounded by her relations that he ecuted, on the 19th August 1871, the agreement on the validity which the case chiefly depends.

This agreement is as follows :—

"Agreement executed on the 19th August 1871, corresponding the 5th Avani of Prajotpatti, to Lokambal Ammal, the widow Rangasawmi Aiyan, cultivator, residing in the village of inakshipuram, in the Trichinopoly Taluk, by Chidambaram ias Venkataramaiyan, the adopted son of the said lady, cultitor, residing at the said place, to wit :—

Out of the wet and dry lands, topes, house grounds, purases and other landed property which came to the share of r said husband on partition as his own property in the age of Minakshipuram, Gouripuram, Analai, Rangachpuram, Tiruppulatturai, Audanallur, Ammangudi Kulumani, angudi, Tachchangudi and Kottattai, the following being luded, *i.e.*, the landed property which by virtue of a ktiarnamah granted by your said husband in the name of r father, Ramasawmi Aiyan, on the 4th February 1861, be- e ever I was adopted by you, and of an agreement granted conformity therewith to you and your father Ramasawmi yan by my natural father, Ramuvaiyan, on the 5th July 1862 gave away on the 10th and 23rd June 1862 in obedie to the orders of your said husband Rangasawmi Aiyan, eased, partly under an agreement to Thy Ammal, the widow his elder brother Venkatarama Aiyan, with power to sell, partly under deeds of absolute sales in favor of Kulumani ana Aiyan in satisfaction of the debts contracted by your band, Rangasawmi Aiyan, and which your father Ramasawmi yan had cleared with his own funds ; there still remain 8 gus in the village of Minakshipuram, after deducting the 3 gus lost owing to the railway out of the 11 pangus had there, ngus in Analai, 1 pangu in Tiruppulatturai, 1 pangu in Tachgudi, and 30 feet of a house-ground to the east of Chelama 's house-ground in the northern row in the Suryavastu haram of Kulumani, which you have continued to hold in ght. These, I, having attained my majority, got from you, ook charge of the said property just as they were in accord-

1879

RAMASAWMI AIYAN v. VENCATARAMA AIYAN.

Judgment.

ance with the abovesaid arrangements ; and in 1869 I leased the said lands to Naganadha Aiyan for a swamibogan ready-money rent, and got the registry transferred accordingly. Of these lands I gave your father, Ramasawmi Aiyan, 6 pangus in the village of Minakshipuram, measuring acres 10 and decimal 8 and 1 pangu in the village of Tachchangudi, measuring acres and decimal 35 ; in all, measuring acres 13 and decimal 43 land, together with the dry and wet lands and all other samudayams thereto appertaining, and a house-ground in the village Kulumani, as per the descriptive statement of lands contained in the additional paper hereto annexed, and got in exchange acres 1 and decimal 30 of land comprised in the $5\frac{3}{16}$ pangus purchased by the said Ramasawmi Aiyan from the said Thy Ammal and Vamana Aiyan under a deed and an agreement, *i.e.* $2\frac{13}{16}$ pangus in the village of Analai, and $2\frac{3}{8}$ pangus in the village of Rangachchipuram, including Pudutiruttukattalai together with the wet and dry lands and all other samudayams appertaining thereto, as also 32 feet of a house-ground where Parmai Setuva Aiyan resides and which belongs to the said Ramasawmi Aiyan, in the Suryavaska Agraharam of the village of Tiruppalatturai, and 24 feet of a house-ground purchased under a deed by the said Ramasawmi Aiyan from Manamettu Chetti in the western row of the Agraharam, running north to south, in the Garudavasakam of the said village, as per the descriptive statement of lands contained in the additional paper hereto annexed. Notwithstanding all this, I have given you for your maintenance for life, in consideration of your feeling it disagreeable to live with me, the $2\frac{3}{8}$ pangus which I got in exchange as aforesaid in the said village of Rangachchipuram, and 2 of the pangus in the village of Minakshipuram, making in all $4\frac{3}{8}$ pangus, together with the wet and dry lands, and all other samudayams thereto appertaining. You shall therefore enjoy the said lands for your life, paying the Government revenue assessed thereon, and defraying the expenses of your maintenance, vows and other ceremonies with the aid of the incomes thereof. The said lands shall revert to me upon your death. You should not subject the said lands, which have been allowed to you, to hypothecation, mortgage, or sale, or otherwise encumber or alienate them.

nyself I agree that, inasmuch as the lands which I enjoy were derived from you, I shall not without your written consent subject them to hypothecation or sale, or otherwise encumber or alienate them. As regards any property other than what has come to you and me under this document, and the landed property passed by you under sale and agreement in obedience to the orders of your husband, I have no claim, interest, or title. As regards the 2 pangus I am entitled to enjoy by reversion on your death in the village of Minakshipuram, I shall take the share of Mettupadugai dry land appertaining thereto, out of the tract lying to the west of the Mettupadugai (cattle pass). Thus I have executed this agreement.

"The lands, &c., of the village of Elumanur, are included in the deed of sale you executed in favor of the said Vamana Aiyan.

(Signed) CHIDAMBARAM *alias* VENCATARAMA AIYAN."

A schedule is appended, specifying in detail the properties to which the mother and son are respectively entitled.

In the year 1873, the plaintiff instituted a suit against the present defendants, which was, by a lamentable miscarriage of justice, dismissed on the ground that he declared himself to be seventeen years old and ought until he was eighteen to have sued by his guardian.

Whereupon he instituted the present suit by his guardian, at first in *formâ pauperis*, but was not allowed to retain that character in his appeal to the High Court.

The suit is against Lokambal Ramasawmi Naganadhu (the son of Ramasawmi, and the lessee under the deed of October 1869), Thy Ammal and Mana Aiyan *alias* Vailialinga Aiyan, who was made a defendant at his own request.

The plaint, which is informal and obscure in substance, seeks to set aside all the alienations of the adoptive father's property which have been described, and claims all the property; from the whole of which, even so much as the defendants admit the plaintiff to have been entitled to, he declares himself to have been ousted. The defendants maintain the genuineness and validity of the transactions which have been described, insist that the deed of 19th August 1871 being binding on the plaintiff

1879

RAMASAWMI AIYAN v. VENCATARAMA AIYAN.

Judgment.

as a family settlement, and deny his dispossession of so n as he was entitled to under it.

The Subordinate Judge dismissed the suit, on the ground the agreement of August 1871, which he treats as a final ad ment of the family disputes, was executed by the plaintiff years after he became of age, was not obtained by frau coercion and was consequently binding on him.

This judgment was reversed by the High Court, on gro which do not very distinctly appear. The Court appears to considered the agreement of the plaintiff's natural father a adoption to have been void in law in as far as it relinquishe behalf of the plaintiff his right to any part of the property w had been his adoptive father's, that he was entitled to set a the alienations made before his adoption as having been fra lent and void against him, and that the agreement of Au 1871 was not binding on him, having been executed by without a full explanation having been given to him of his ri They appear also to have treated his allegation, of which he l self gave some evidence, of his dispossession from the who the property as established and decree to him all the prop claimed in the schedule to his plaint, that is all his adop father's property together with (as is asserted by the appell more property which he claimed by a supplemental sche which he was allowed to file. The present appeal is from judgment.

Some of the circumstances of this case are peculiar. The adopted son became his father's heir; on the death of tha after that of his father, the widow became the heir, not of late husband but of the adopted son. Whether by the a adopting another son she in point of law divested herself of estate in favor of the second son may be a question of a nicety, on which their Lordships give no opinion. How fa natural father can by agreement before the adoption renoun or part of his son's rights, so as to bind that son when h comes of age, is also a question not altogether unattended w difficulty; although the case of *Chitko Raghunath Raje and others* vs. *Panaki*, 11 Bom. H. C. R., 199, con decides that an agreement on the part of the father

his son's interest shall be postponed to the life interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification, when his son became of age. The main question in the cause is, therefore, reduced to this,—whether the son did or did not validly ratify it. Unquestionably the manner in which Ramasawmi contrived to get into his hands two-thirds of the property of Rangasawmi, partly through his daughter and partly through his sister, raises a very strong suspicion, to say the least, of unfair dealing against him; and if it had been shown that the instrument of 1871 had been executed by the plaintiff under his influence (as probably the lease of October 1869 was), it would be properly set aside. It must be borne in mind, however, that the plaintiff when he executed it had been of age two years; that he was sufficiently alive to his rights to be aware that the lease of 1869 was injurious to him, and to desire to set it aside; that he was residing with his wife's family, strangers it would appear to that of his adoptive mother, and that before executing the instrument he consulted members of his wife's family, upon whose advice he acted. It may be further observed that in a subsequent suit the plaintiff, about twelve months after, stated that he enjoyed the property of his adoptive father under this agreement.

Such being the evidence, and the Subordinate Judge, who had the advantage of hearing the witnesses, having found in favor of the validity of this document, their Lordships have come to the conclusion that there are no sufficient grounds for setting it aside.

The main question being thus disposed of, two subsidiary questions remain to be noticed.

It was the plaintiff's case, supported by some evidence, that he had never been allowed to take possession of any part of his adoptive father's property, while there was evidence on the other side that he had taken and kept possession of so much of it as he was entitled to under the deed of 19th August 1871. There is no issue, and no express finding on this question in the Court below, but it may be assumed that the Judge adopted the

1879

RAMASAWMI AIYAN v. VENCATARAMA AIYAN.

Judgment.

contention of the defendants. The judgment of the High Court however, assumes the plaintiff to have been wholly dispossessed and that by all the defendants. Under these circumstances, it seems to their Lordships that the case cannot be satisfactorily disposed of without a re-trial of this question, if, indeed, it has been tried at all, and that an express finding should be come to whether the plaintiff has been dispossessed, or kept out of possession, of all or any of the property to which he was entitled by the last mentioned deed, and, if so, by which of the defendants?

It further appears that compensation money was paid to Lokambal by the Railway Department for lands taken from the one-third portion of the lands of Rangasawmi, to which, under the deed of adoption of 5th July 1862, the plaintiff was entitled; the sum is stated by the plaintiff to be Rs. 2,500, by the defendants to be Rs. 1,700.

Their Lordships do not consider that, by the deed of 19th August 1871, the main object of which seems to have been to ratify the disposition which had been made of the specified properties mentioned in it as "having been excluded," and to assign to the widow a specific portion of the remaining land in lieu of maintenance, the plaintiff can be taken to have relinquished his claim to this money. An issue in this question was framed in the Court below, but it is not alluded to in the judgment. Their Lordships are of opinion that the question should be tried to how much of this sum the plaintiff is entitled; it will, of course, be open to the defendants to prove that the money received has been properly expended on the land, as they have alleged it to have been in their answer. On the legal effect of the plaintiff's covenant against alienation their Lordships do not think it necessary to give an opinion.

In accordance with the views which they have expressed, their Lordships will humbly advise Her Majesty that the judgment and decrees of both the lower Courts be reversed, and that it be declared that the parties are bound by the deed of the 19th August 1871. That the High Court be directed to remand the case to the District Court of Trichinopoly for the trial of the following issues, viz:—

1. Whether the plaintiff has been ousted or kept out of

1879

n of all or any of the lands to which he was entitled under
id deed; if so, by which of the defendants?
To how much, if any, of the said compensation money paid
Railway Department he is entitled?
t the said District Court do return the findings on those
to the High Court in accordance with the direction of the
of Civil Procedure, and that the High Court do thereupon
determine the case.
t each party do bear his own costs of this appeal, and that
costs of the parties in the lower Court do abide the event
final decision of the suit.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF JADUBAR MOOKERJEE. *October 6th.*

riminal Procedure Code (Act X of 1872) section 220—Acquittal.

An order dismissing a complaint under section 220 of the Code of iminal Procedure amounts to an acquittal.

his case, upon a reference being made to the High Court by agistrate of Nuddea, under section 296C. of the Criminal dure Code, in which he alleged that the order passed by eputy Magistrate of Nuddea on the 24th of June 1879, sing a complaint of illegal confinement under section 220 Criminal Procedure Code, was illegal and should be reversed, e was issued by Mr. Justice MORRIS and Mr. Justice EP on the 12th of September last, calling upon Jadubar erjee, a Sub-Inspector, to show cause why the order should set aside and the trial proceed.

complainant in this case had been confined without sufficause and illegally, as found by the Deputy Magistrate, by cused, who professed to act under section 93 of the Criminal dure Code. Inasmuch, however, as this was the accused's first and, in the opinion of the Deputy Magistrate, it had arisen misconception of the law, the complaint was dismissed section 220 of the Criminal Procedure Code.

1879

In re JADUBAR MOOKERJEE.

Judgment.

On the rule coming on for hearing before the High Court,

Baboo *Nil Madhub Bose* appeared to show cause.

Baboo *Umakali Mookerjee contra.*

In discharging the rule, the Court (1) passed the following order :—

It is important to see exactly what the question before us now is. It is raised by a letter of reference from the Magistrate, who is dissatisfied with the order passed by the Deputy Magistrate upon the facts found by him. He says :—"A charge having been drawn, the Deputy Magistrate was bound by section 220 of the Procedure Code to acquit or convict."

The statement is correct that there was a charge drawn up, and the law laid down by the Magistrate is also correct, viz., that the Deputy Magistrate was bound to acquit or convict. But he goes on :—"Accordingly, he was wrong in dismissing the case only," implying that there was neither an acquittal nor a conviction, but a dismissal of the case, not amounting to either. A rule accordingly was issued to show cause why the order of the Deputy Magistrate, dated the 24th June, dismissing the complaint of illegal confinement, should not be set aside and the trial proceed.

We have now the whole record before us, and it seems to us quite clear that the Magistrate is under a misapprehension when he states that there was neither an acquittal nor a conviction.

The Deputy Magistrate, on the facts before him, rightly or wrongly made the order that the case be dismissed under section 220. Now the dismissal of a case under section 220 can only be an acquittal, so that the Deputy Magistrate has acquitted the accused.

If that order of acquittal is wrong, the Government has its remedy by appeal, but the propriety of the acquittal is not before us. On this ground we think that we should not interfere with the order made by the Deputy Magistrate, and that the rule should be discharged.

(1) WILSON and TOTTENHAM, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

MOYI DABIA . . . . . APPELLANT; 1878 *December 5th.*

AND

ESHURI DABIA . . . . . RESPONDENT. No. 137 of 1878.

Succession Act, section 261—*Act XL of* 1858, *section* 3—*Permission Part to represent Minor—Civil Procedure Code, Act X of* 1877, *ss* 440 *and* 462.

Applied for revocation of probate granted to J. who styled himself ther and guardian of B, minor," but it did not appear that A had ed a certificate under section 3 of Act XL of 1858, or had the sion of the Court to represent the minor. The petition was sed, but on A's death, an appeal was preferred by the minor, h his natural guardian.

d, that the appeal could not proceed, inasmuch as the minor was party to the proceedings in the Court below.

permission of the Court to institute proceedings on behalf of a , being an act of judicial discretion open to appeal, must be lly recorded.

L from an order of the Officiating Judge of Rajshahye.

s case one Bholanath Khan, by petition dated 21st 1284, applied for probate of the will of one Doyamoni eceased. Under that will the applicant was appointed and manager of the property during the minority of f the testatrix, this son being the sole devisee.

petition being presented, notice was served, but pending roceedings the minor died. Thereupon Jogodeshuri Dabia, ter of the testatrix, filed a fresh petition for probate, and me time Bholanath filed a further petition admitting that had terminated with the death of the minor.

e 31st December 1877, probate was granted to uri.

8th January 1878, one Khetter Nath Chuckerbutty applied cation of probate, styling himself "father and guardian Nath Chuckerbutty, minor." It did not appear that ger had obtained a certificate under Act XL of 1858, e permission of the Court to represent the minor. ion was dismissed.

1878

MRINAMOYI DABIA v. JOGODESHURI DABIA.

Argument.

On the death of Khetter Nath shortly afterwards, an *ex-parte* application was made by the mother of Shib Nath to the High Court that her name might be substituted on the record as guardian of her minor son. The application was granted, and an appeal against the order granting probate was then filed by Shib Nath through his mother and guardian.

Baboo *Kishori Mohun Roy*, for the Appellant.

O'Kinealy and Baboo *Gurudas Banerjee*, for the Respondent.

O'Kinealy.—The hearing of this appeal cannot proceed, for the present appellant was no party to the proceedings in the Court below.

Section 261 of the Succession Act declares that the objector shall be the defendant. Now the objector in the lower Court was the father of the minor, and not the minor himself. True, he styles himself "father and guardian of the minor," but that is a mere description, and nothing done in the Court below is binding on this minor—*Sreenath Koondoo* vs. *Hurree Narain Muddick*, 7 W. R., 399; *Mongula Dossee* vs. *Sharoda Dossee*, 20 W. R., 48; *Joyram Lall Mahtoon* vs. *Stewart*, *ib.*, 453. Sections 440 to 462 of the new Code of Civil Procedure show how minors are to be brought before the Court. Besides, the father of the minor had no certificate under section 3 of Act XL of 1858, nor did he obtain the leave of the Court to institute these proceedings.

Baboo *Kishori Mohun Roy*.—The proceedings in the Court below were taken on behalf of the minor; at any rate the objection should have been taken by cross-appeal. As to the objection that the father of the minor had no certificate, it is too late. It should have been taken in the Court below.

[MORRIS, *J.*—*Goono Monee Debia* vs. *Ram Kumol Sandle*, 17 W. R., 144; and *Aukhil Chunder* vs. *Tripoora Soonduree*, 22 W. R., 525, seem to show that the Appellate Court will assume that leave to institute proceedings has been given.]

O'Kinealy, in reply.—It is idle to say we should have filed a cross-appeal, the judgment being wholly in our favour. In the case in 17 W. R., 144, it appears that leave was actually given. The judgment in the case in 22 W. R., 225, is confused

1878

MRINAMOYI DABIA v. JOGODESHURI DABIA.

Judgment.

nd seemingly contradictory. Besides, no facts are given. The se must be dismissed, even in special appeal, if the provisions of ction 3 of Act XL of 1858 are not complied with—*Sitaram lat* vs. *Sitaram Gonesh*, 6 Bom. A. C. J., 250; *Madho Rao* ja vs. *Thakoor Pershad*, 3 Agra, 127. The provisions of section ave been clearly explained by JACKSON, *J.*, in *Ram Chunder uckerbutty* vs. *Brojonath Mozumdar*, 4 C. L. R., 252. The rer Court has a discretion to exercise, and an appeal will lie m a wrong exercise of that discretion. But how is the pellate Court to know the discretion has been properly rcised, unless there is something on the record to show that discretion has been exercised at all?

The following judgment of the High Court (1) was delivered by

MORRIS, *J.*:— MORRIS, *J.*

The preliminary objection taken that this appeal cannot proceed st, we think, prevail. The minor whom the appellant Mrinayi represents in the appeal was not a party, as the law requires, he proceedings in the Court below; nor can he be affected these proceedings.

The application for revocation of the probate, applied for by odeshuri, was made by Khetter Nath who styled himself ther and guardian of the minor Shib Nath." There is nothing he record to show whether or not, and so far as this Court is re, Khetter Nath had not obtained a certificate under Act XL 1858, nor had he permission granted by the Court, under the ial circumstances specified in section 3 of that Act, to repre- the minor. Now we think that this permission must be for- ly recorded by the Court, as it is an act of judicial discretion h is necessarily open to appeal. This view appears to us to be orted by various rulings of this Court, and of the Allahabad Bombay High Courts. The present Procedure Act which is cable to this case lays down a form in which a minor should r as a party in a suit, and this form must be strictly fol- Any neglect of it may be attended with serious conse-

(1) MORRIS and PRINSEP, *J.J.*

1878 quences, as it may be that at a subsequent period, the minor r repudiate the acts of his self-elected guardian and decline t bound by the proceedings taken improperly on his behalf. therefore, dismiss this appeal with costs.

[CRIMINAL JURISDICTION.]

1879. IN THE MATTER OF GRISH CHUNDER TALOOKDAR.

Cross-examination of witnesses called by the Court.

The Court ought not to refuse to allow the cross-examination witness called by it.

THIS was an appeal from a conviction passed by the Sessi Judge of Rajshahye on the ground, *inter alia*, that the Judge refused to allow the cross-examination of a witness called the Court, and that the prisoner had been seriously prejudi thereby.

H. Bell, and Baboo *Gopaul Lall Mitter*, for the Prisoner.
Baboo *Ram Chunder Mitter*, for the Crown.

The judgment of the High Court (1) was as follows :—

The appellant has been convicted by the Court of Session Rajshahye of having abetted the commission of forgery, and been sentenced to imprisonment for three months and to a f The appeal has been argued by Mr. Henry Bell, who, I und stand, also defended the prisoner before the Court below, and learned Counsel impugns the conviction on several grou He contends that, in the first instance, no legal offence has b established against the prisoner. He also contends that evidence for the prosecution is untrustworthy, and further th is greatly outweighed both in point of respectability and tainty by the evidence for the defence. He contends in part that the principal witness in regard to the actual fact of ment, that is to say, Mahomed Mohsim, is a tainted witne he ought not to be believed ; that his evidence is improbab

(1) JACKSON and TOTTENHAM, *J.J.*

iscrepancies, and more especially is discrepant with that n's son, Ahmed Hossein, who also gave evidence in of Mohsim's statement. The learned Counsel contends the affirmative case set up for the appellant, viz., that of money secured by the bond of which the forgery is ve been contemplated, had been in fact paid by Dino igh before his death, and that consequently there was no for the prisoner taking the very serious and dangerous ch he is said to have taken, has been sufficiently proved. ion to these arguments, founded upon the evidence, the Counsel submitted to us that the prisoner has been prejudiced by the procedure of the Court of Sessions in ulars, one being the refusal of the Sessions Judge to cross-examination of a witness who was called by the d secondly an act done by the Sessions Judge during the ch was calculated not only to disclose prematurely the pinion in respect of the case, but also to discourage the from entertaining a contrary opinion.

Court here dealt with the first of the legal objections

as to the alleged defect in the procedure of the Court of we have no doubt that the Sessions Judge was wrong in to permit the cross-examination of the witness called Court. The ordinary practice in properly constituted is, that where a witness for the prosecution is not the part of the Crown, he is placed in the witness-box that the defence may have an opportunity of cross- g him; and certainly when the Judge thought it to call one of these witnesses for the purpose of some facts which he thought material for the prosecu- prisoner ought to have been allowed an opportunity ng any question that he thought necessary in cross- tion.

he question arises whether the refusal of the Sessions a this instance has prejudiced the prisoner. Now, it o us, considering what the matter was which the witness police officer had been called to prove, and as to which examination was desired by the prisoner, that the sub-

1879

ject is of so outside a character, if I may so express myself, that really neither the examination by the Judge, nor any possible cross-examination by the prisoner, could have affected the result. It is restricted entirely to a point to which I shall presently advert, viz., as to the conduct of one of the witnesses, Mohsim's son, and the possible custody of the papers which were given to Mohsim at a particular time before they were seized by the Police.

[The Court then proceeded to deal with the merits of the case and in the end affirmed the conviction of the lower Court.]

[CRIMINAL JURISDICTION.]

Sept. 10*th.*

No. 982 of 1879.

EMPRESS . . . . . .

AND

DHUNIRAM . . . . . .

Criminal Procedure Code (Act X of 1872*) section* 491*—Breach of peace—Adjournment of Proceedings, Effect of—Discharge.*

An order postponing proceedings instituted under section 491 of the Code of Criminal Procedure (Act X of 1872) until the person called upon to show cause shall have established in a Civil Court the title claimed by him to the property disputed, with reference to which there is a likelihood of a breach of the peace, amounts to a discharge.

CRIMINAL REFERENCE under section 296 of the Code of Criminal Procedure submitted by the Sessions Judge of Patna.

Mr. *M. L. Sandel,* for the Prisoner.

The circumstances under which the reference was made appear from the following judgment thereon by the High Court (1):—

It appears that one Dhuniram was called upon to show cause why he should not be bound down to keep the peace by the Deputy Magistrate of Behar. On his appearance he set up a deed upon which he laid claim to be in possession of a certain property in dispute. Thereupon the Deputy Magistrate passed

(1) MORRIS and PRINSEP, *J.J.*

1879

EMPRESS v. DHUNIRAM.

Judgment.

he following order :—"I order him to have the deed declared alid by the Civil Court, and that he is in possession as Thikadar. ill he has this matter settled in the Civil Court, this case will adjourned. As a proof of his good faith he should institute e case in the Civil Court."

The Deputy Magistrate also passed an order requiring Dhuniam to attend daily at his Court on a recognizance of Rs. 1,000, d this order was kept in force notwithstanding the postponeent of further proceedings.

It appears to us that if it was necessary to proceed against huniram under section 491, the proceedings ought to have en brought to an early termination. The likelihood of his mmitting a breach of the peace would in no way depend on his instituting a case in the Civil Court to establish his ght under a certain deed, and any order postponing further oceedings until he did this, could, in our opinion, amount ly to a discharge so far as those proceedings were concerned. was both inconsistent and arbitrary to require Dhuniram institute a suit, and at the same time to insist upon his daily tendance in the Criminal Court under very heavy recognizance d for no apparent reason. We hold, therefore, that the order the Deputy Magistrate postponing further proceeding amounted to a discharge, and we direct that Dhuniram be relieved from rther attendance in the Deputy Magistrate's Court, and at this personal recognizance be discharged. It will, of course, open to the Deputy Magistrate should the necessity arise institute fresh proceedings under section 491.

[CIVIL APPELLATE JURISDICTION.]

1879 Sept. 15th.

No. 110 of 1879.

NITTYO KALI DABEA AND ANOTHER . . . APPELLANTS;

AND

KEDAR NAUTH CHATTERJEA AND OTHERS . RESPONDENTS.

Administration—Certificate, Application for, by two widows of intestate—Practice—Court Fees Act, VII. of 1870, *Schedule I, No.* 10—*Certificate of Administration, Court Fee Stamp on.*

Where the widows of an intestate applied for administration to the estate of the deceased—

Held, that the District Judge before whom the application was made was right in following the usual practice (which was declared to be a reasonable practice) of his Court in refusing to grant such administration to the widows jointly.

The Court fee stamp to be imposed on a certificate of administration ought not to be assessed on a valuation, including property absolutely denied by the applicants to belong to the intestate's estate until the contrary be proved.

APPEAL from a decision of the District Judge of Hooghly, dated 15th April 1879.

Baboo *Unnoda Persaud Banerjee*, and Baboo *Troilokyo Nath Mitter*, for the Appellants.

No one appeared for the Respondents.

The facts sufficiently appear from the following judgment of the Court (1), which was delivered by

PONTIFEX, *J.* PONTIFEX, *J.* :—

This is an appeal from an order of the District Judge of Hooghly under the following circumstances :—A Hindoo gentleman having died intestate leaving two widows, the two widows applied before the District Judge for a certificate. Their application was opposed, evidence was taken, and upon that evidence it

(1) PONTIFEX and MCDONELL, *J.J.*

1879

NITTYO KALI DABEA v. KEDAR NAUTH CHATTERJEA.

Judgment.

PONTIFEX, J.

pears that the estate of the intestate consisted of certain vernment papers and of certain debts admitted to be due to estate by the widows. The objectors also insisted that a sum Rs. 8,000 secured on bonds in the names of the two widows nged to the estate. The widows, on the other hand, absolutely ied that, and claimed the Rs. 8,000 as their own property. District Judge, following the practice of his Court, has refused grant the certificate to more than one of the persons who ied for it, but in his discretion has offered to grant it to the r widow. He has also refused to grant the certificate unless rity should be given, covering the bond-debts in the names of two widows. He has further directed that before the certifi- be given, Court fees should be furnished on the valuation of 16,000 which would include the bond-debts in the names of two widows.

'e are of opinion that the Judge is perfectly entitled to follow practice of his Court, which is a usual and reasonable practice, administration should be granted only to one person. We lso of opinion that it was his discretion to call for such secu- as he might think fit. He heard the evidence, and if in his ion there was a reasonable suspicion that the bond-debts in names of the widows belonged to the intestate's estate, he bound to call for sufficient security. We think, therefore, we ld not interfere with his order in either of these particulars.

it we think that inasmuch as the persons claiming the certifi- absolutely denied that the bond-debts belonged to the intes- estate, the Court fee stamp should, until the contrary is ed, be taken only on the valuation of the estate excluding the l-debts. In other respects we must affirm the order of the e. Now, it appears that these two ladies, (or the one of them om the certificate has been offered,) have great difficulty in hing security. We would suggest to the parties that inas- as a considerable portion of this estate consists of Goveru- paper, they might avoid the difficulty of giving security lying to the Administrator-General to take upon him- administration of this estate. The estate would then be d properly administered at a very small cost, and the ladies gree to have the question tried as between themselves and

1879

the Administrator-General as to whether or not the bond-debts did belong to the intestate's estate. If they are justified in believing that the bond-debts do not belong to the intestate's estate they might at small cost guarantee the costs of such a suit to the Administrator-General. If, on the other hand, they are not entitled to the bond-debts, and it is decided that such debts belong to the intestate's estate, then they ought to bear all costs. We merely throw this out as a suggestion to the parties in order to save them the difficulties and expense connected with furnishing security.

[CIVIL APPELLATE JURISDICTION.]

July 28th.

No. 1423 of 1878.

JEHANGIR MAHOMED . . (PLAINTIFF) . APPELLANT;

AND

MAHOMED AIJAD AND OTHERS (DEFENDANTS,) RESPONDENTS.

Mahomedan Law—Pre-emption—Tulaba-ishtihad.

It is sufficient to establish the right of pre-emption that the ceremony of *tulaba-ishtihad* be performed before witnesses in the presence of the purchaser upon the lands which are the subject of the claim although he be not in possession.

APPEAL from a decision passed by the Subordinate Judge of Sylhet, affirming the decree of the Moonsiff of Sonagunge.

The plaintiff, in this case, sued to enforce a right of pre-emption of certain lands which he claimed as a sharer in the talug of which the lands formed part. He alleged that the principal defendants had purchased a moiety of the lands in question, and that as soon as he heard of the sale he performed the preliminary ceremonies required by the Mahomedan Law, and tendered the price to the defendants and expressed his desire to purchase, but that they had refused to transfer.

It appeared that the ceremony of *tulaba-ishtihad* was performed in the presence of the purchaser on the premises, but not before the vendor who was in possession. The Moonsiff was of opinion that the ceremony had not been duly performed, and, therefore, dismissed the suit. On appeal the Subordinate Judge affirmed

the Moonsiff's decision, and the plaintiff now preferred this second appeal to the High Court.

1879

JEHANGIR MAHOMED v. MAHOMED AIJAD.

Judgment.

Baboo *Joy Gobind Shome,* for the Appellant.
Baboo *Bama Churn Banerjee,* for the Respondents.

The judgment of the High Court (1), which was as follows, was delivered by

MORRIS, *J.*:—

MORRIS, *J.*

We think that the Judge has not correctly stated the law on the point of pre-emption that is here raised, and has somewhat misunderstood the ruling which he has quoted in the case of *Ramroo Pashaon* vs. *Pulwan Roy,* reported in 16 W. R., 3.

The question before the Court in that case seems to have been whether it was necessary to render valid the ceremony of *Talaba-ishtihad,* to make the affirmation before witnesses in the presence of either the purchaser or the vendor. The Court held that "the affirmation before witnesses is required to be in the presence of the vendor and the purchaser, in order that they may know what is being done against their interests," and further on added: "It is quite clear that whether it be the vendor or the purchaser, whoever is in possession of the lands, should be present to witness to the affirmation." We do not, however, understand the Court by this last sentence, to lay down as a distinct proposition of law that, if the purchaser only is present and not in possession of the land, the affirmation before him in the presence of witnesses would invalidate the right claimed.

In the Digest of Mahomedan Law by Baillie, p. 483, the law on this point is thus stated:—"To give validity to the *tulabaishad,* it is required that it be made in the presence of the purchaser, or seller, or of the premises which are the subject of sale." And again: "If possession has not been taken of the things sold, the pre-emptor has an option, and may, if he chooses, make the demand in the presence of the seller, or of the

(1) MORRIS and PRINSEP, *J.J.*

1879

JEHANGIR MAHOMED v. MAHOMED AIJAD.

Judgment.

MORRIS, *J.*

premises; or he may make it in the presence of the purchaser, though he is not in possession because he is the actual proprietor."

In the present case there is no doubt that the invocation was made by the claimant pre-emptor, in the presence of the purchaser on the premises. The Subordinate Judge was, therefore, wrong to dismiss the suit of the plaintiff on the ground that the ceremony had not been properly performed in this respect. We observe that the case generally has not been fully tried. The Subordinate Judge has not determined the validity or otherwise of the first ceremony of *tulaba-moowathubut* on which the Moonsiff expressed a strong opinion, and has confined himself to dealing only with the ceremony of *tulaba-ishtihad*. The case must therefore go back to the lower Court, in order that it may be re-tried. It will be necessary for the Court to determine whether the ceremony of *tulaba-moowathubut*, as well as the ceremony of *tulaba-ishtihad*, has been duly performed. And also the further issue whether the plaintiff has a right of pre-emption at all.

Costs will abide the result.

[CRIMINAL REVISIONAL JURISDICTION.]

October 6th.

No. 228 of 1879.

IN THE MATTER OF CHUNDER NATH DEB AND OTHERS . . . . . PETITIONERS.

Appeal, Right to withdraw petition of.

A petition of appeal presented for admission may be withdrawn.

THIS was an application to have an order made in appeal by a Sessions Judge, enhancing a sentence passed by the Deputy Magistrate upon the petitioners, on the ground that the petitioners had applied to have the appeal withdrawn on the day fixed for the admission or rejection of their petition of appeal before the same had been admitted, and that the Judge had not only refused their application, but, on the appeal being heard, had enhanced the sentence.

M. Ghose, for the Prisoners.

Baboo *Ram Charun Mitter*, for the Crown.

1879

In re CHUNDER NATH DEB.

Judgment.

The following order was made by the High Court (1) :—

We think the order of the Sessions Judge enhancing the sentence passed on the prisoners by the Deputy Magistrate must be set aside.

It appears that a petition of appeal was presented by the prisoners against the conviction by the Deputy Magistrate, and a day was fixed for the admission or rejection of the said appeal. On the day so fixed, and before the appeal was admitted, the Judge having expressed an opinion relative to the enhancement of the sentence, if the conviction were upheld, the appellants' Vakeel proposed to withdraw the petition of appeal, but the Sessions Judge declined to allow him to do so, on the ground that there was no provision in the Code to that effect.

It seems to us that every privilege given to a party by the law may be waived at the option of that party. A right to appeal is a privilege given by the law, and the party concerned is at liberty to insist upon or abstain from the exercise of that right. The Sessions Judge, we think, ought not to have insisted upon the appeal being admitted, and to have enhanced the sentence upon such appeal. If he had reason to think that the sentence passed by the Court below was inadequate, his proper course was to follow the procedure laid down in section 296, and refer the matter to this Court. The order of the Court of appeal enhancing the sentence, therefore, will be set aside, and the conviction and sentence of the Deputy Magistrate will stand. The prisoners whose term of imprisonment has expired will be released.

(1) WILSON and TOTTENHAM, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

1879. RAJAH LALL . . . . . (DEFENDANT) APPELLANT;

August 30th.

AND

No. 132-135, 137 and 167 of 1877. DELPUTTI SINGH . . . . . (PLAINTIFF) RESPONDENT.

Minors—Act XL of 1858, *section* 18, *Effect of sanction under—Onus of proof —Suit to recover property sold by Guardian with sanction of District Judge under Act XL of* 1858, *section* 18—*Limitation Act, IX of* 1871, *Sch. II, Arts.* 15, 92 *and* 145—*Registration, Whether Limitation runs from date of.*

Where the plaintiff sued to recover possession of certain properties, which had been sold with the sanction of the District Judge under section 18 of Act XL of 1858 for the payment of debts, during his minority by his guardians, *held*, that although the plaint asked that the deeds of sale might be set aside, the primary object of the suit was the recovery of the property, the validity or invalidity of the sales forming only one of the questions involved in that claim, and that, therefore, the period of limitation prescribed was that provided by section 145 and not section 92 of the Limitation Act (IX of 1871.)

Bennett vs. *Hamill*, 2 Sch. and Lef. 576.

The sanction accorded under section 18 of Act XL of 1858 by a District Judge to an alienation of a minor's property, is not an order of the nature contemplated by Art. 15, Sch. II of Act IX of 1871.

Per GARTH, *C.J.* (following the principle laid down in *Bennett* vs. *Hamill*, 2 Sch. and Lef. 576; and *Bowen* vs. *Evans*, 1, Jones and La Touche, 178):—A purchaser, who has purchased in good faith under an order for sale of a District Judge made under section 18 of Act XL of 1858 acquires a good title, unless the minor or those claiming under him can show, at some future time, that the sale was fraudulent or improper, and that the debt which formed the consideration for the sale was one for which he was not responsible.

Per PRINSEP, *J.*—The only effect of the sanction of the District Judge is to throw the *onus* on the plaintiff to show that the alienations were improperly made, but where the purchasers are the creditors, whose debts were satisfied by such alienations, the burden of proof is shifted on to their shoulders as soon as the plaintiff has established a *primâ facie* case. Strangers purchasing under such a sanction would be entitled to every protection so long as it was not shown that they

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

had acted in a fraudulent or collusive manner, knowing that the debts for the liquidation of which the purchase money would be applied, were not binding upon the minor. * * * * * The entire case upon which an alienation of property belonging to a minor was sanctioned by a District Court can, in a regular suit, be considered, if the minor, on attaining his majority, thinks that such alienation has been wrongly permitted, and that he was not liable to satisfy the particular debts which the District Judge on an *ex parte* case held were binding on the estate.

REGULAR APPEALS from a decision passed by the Subordinate Judge of Shahabad.

These appeals were preferred in suits which were brought by plaintiff as the adopted son of one Aree Bhunjun Singh, who d a minor, to recover possession of his father's shares in seve- ancestral properties which were sold to the defendants in the , or their ancestors, with the sanction of the District Judge n under section 18 of Act XI of 1858.

The validity of the adoption of the plaintiff was disputed, and lence was given a great length upon the point. Issues, which e raised as to whether the sales were made to satisfy the debts which the plaintiff was liable, and whether the suits were barr- by limitation, were decided in favour of the plaintiffs by the irt of first instance.

The facts upon which that decision was arrived at are fully out in the judgments delivered by the High Court.

D. Bell (Acting Ad -Gen.), Baboo *Mohesh Chunder Chowdhry*, oo *Hem Chunder Banerjee*, Boboo *Chunder Madhub Ghose*, and oo *Abinash Chunder Banerjee*, for the Appellants.

oodroffe, Moonshee *Mahomed Yusoof*, Baboo *Saligram Singh*, Baboo *Durga Pershad*, for the Respondents.

e following judgments were delivered by the High Court

PRINSEP, *J.*

PRINSEP, *J.*:—

l Singh having two sons, Reet Bhunjun and Gooman n, in 1849 executed a deed by which, after reserving for

(1) GARTH, *C.J.*, and PRINSEP, *J.*

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

PRINSEP, J.

himself and his wife certain properties, he made over the remainder of what constituted the joint family estate under Mitakshara Law to his two sons, in the proportion of 9 annas and 7 annas, stipulating that they should pay the Government revenue on all properties, and be liable for all the debts existing. He also provided that, in the event of the birth of another son, that son should get a 3 annas share from Reet Bhunjun, and 2 annas share from Gooman Bhunjun. A son, Aree Bhunjun, was born very shortly afterwards. Doyal Singh died in 1857-58. The minor Aree Bhunjun was for a short time under the guardianship of his mother, but on her death, his brothers applied in September 1859, and on 8th February 1860 obtained a certificate under Act XL of 1858, as his guardians.

There is no doubt that there were very considerable debts outstanding against the two brothers, if not against the minor also, the precise nature of some of which it is necessary to determine in the suits now under trial. On the 7th January 1864, Reet Bhunjun executed a mooktearnamah in favor of Gooman Bhunjun, empowering him to act on his behalf, and also as sole guardian for Aree Bhunjun, to make the best possible arrangements to satisfy these debts. Accordingly, on the 23rd February 1864, a joint petition was presented to the District Judge for his sanction under section 18, Act XL of 1858, to sell some of the properties belonging to the minor, Aree Bhunjun. That petition set forth the general indebtedness of the family; it declared that "upwards of four lacs of rupees are due to the creditors under decrees and deeds from your petitioners and the minor, as per details below, in addition to the special debts of your petitioners;" that many of their properties had been attached in execution of decrees advertised for sale, and it therefore asks for permission of the Court to sell the minor's share *in a few of the mouzahs and villages* together with their own by private sale. The specification of debts attached to this petition merely gives the names of the creditors and the amount due to each, and it is not stated what "mouzahs and villages" it was proposed to sell. On this, the Courts of the Principal Sudder Ameen and Sudder Ameen were called upon to send a list of the amounts of the decrees under execution in which "Baboo Aree Bhunjun Singh, minor, is

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

PRINSEP, J.

a debtor," and a notification was to be suspended in a conspicuous part of the Court, and at the dwelling place of the minor, fixing "fifteen days time" for objections to be made. The attendance of the petitioners was next required for their examination. Baboo Reet Bhunjun excused himself on the ground that he had authorized his brother to act, and that his brother was fully acquainted with all the concerns of the family, a petition to that effect being filed on his behalf by his pleader. On the same day, 18th April 1864, Baboo Gooman Bhunjun Singh was examined. He merely stated that considerable debts were due from himself, Reet Bhunjun, and the minor Aree Bhunjun, but they could not be liquidated without selling the properties, and he asked that the shares of all the three brothers might be sold simultaneously, so that they might save the other properties for their support. When asked the amount of the debt due from the minor he stated that he could not recollect, but a list was on the record. (Now I may observe, in passing, that there is no such list on the record so far as it is before us, and it would seem that the list referred to is that which is attached to the petition of 23rd February 1864, which only gives the names of the debtors and the amount due to each, without any specification of the nature of any of these debts, by whom they were contracted, and who is responsible for their payment). On this very unsatisfactory and meagre examination the District Judge passed the following order:—"After perusal of the list and the papers and the petition of Baboo Reet Bhunjun Singh, it is ordered that the petition of the petitioner be allowed; that a certificate empowering him to sell the share of the minor along with the share of Baboo Reet Bhunjun and Baboo Gooman Bhunjun be duly granted; that for the purpose of effecting a sale, allowance of two months be made; that a separate proceeding be recorded on this; and that a copy thereof be forwarded to the Principal Sudder Ameen and Sudder Ameen, directing them to issue a notification granting two months time for the sale of the property of the petitioners and the minor. 18th April 1864."

On the 21st April the records of the proceedings of the decree in execution were called for from the Subordinate Courts, and by a further proceeding of the 20th June it would seem that

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

PRINSEP, J.

meantime the issue of sanction for the sales under section 18 was postponed, for on that day a further postponement for one month of the sales in execution was ordered, so that the records might be examined. However, two days later, *i.e.*, on 22nd June, a further proceeding was recorded, in which it was stated that "on searching the office, and referring to the records of execution and objection suits, it appears that the debts due to the creditors by the minor jointly with Baboo Reet Bhunjun and Gooman Bhunjun Singh, guardians, are as detailed below according to the schedule sent by the Principal Sudder Ameen and Sudder Ameen annexed to this petition."

These form a general schedule of debts under four headings:-

		Rupees.
(1.)	Debts due by the minor jointly with his guardian under decrees under execution in the Principal Sudder Ameen's Court, notified for realization by sale	51,42
(2.)	Debts secured by deeds in which objections have been filed	4,42,8
(3.)	Debts due by the minor jointly with his guardians under execution in the Sudder Ameen's Court	1,8
(4.)	Do. in the District Judge's Court ..	6,3

The Judge accordingly found that "as the debts due und decree and deeds by the minor jointly with his guardians app enormous, and their estates are notified for auction sale, it wo be advantageous for the minor to sell them privately." Con quently it was ordered "that a certificate be granted to Ba Gooman Bhunjun Singh, one of the guardians, to sell the sh of the minor along with the shares of the guardians for the p ment of debts due to creditors." It was further required "information of whatever deeds may be executed, be submitt this Court."

Accordingly five deeds of sale were executed on 9th A 1864, which were submitted to, and were signed by the Di Judge, and on 10th August Baboo Gooman Bhunjun Singh himself and his brother Reet Bhunjun, filed a statement sh the general result of the sales, and stating that notwithsta these sales of properties valued at Rs. 2,95,000, other prop

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

PRINSEP, *J.*

were still under attachment and notified for sale. Aree Bhunjun died a minor on 13th May 1867, having been attacked with cholera while bringing home his newly-married wife. It is stated for the plaintiff, his widow, that shortly before his death he adopted Delputti, the third son of his brother Gooman Bhunjun Singh, enjoining on his wife to complete the religious ceremonies of adoption.

Plaintiff, Aree Bhunjun's widow, now sues on behalf of that son, a minor, to recover properties sold under five deeds of sale with the sanction of the District Judge given under section 18, Act XL of 1858. She alleges that the sales were on account of debts not legally binding on the minor, and that therefore the minor is entitled to treat them as null and void.

After the filing of these appeals, and before they came on for hearing, the widow of Aree Bhunjun died, and the widow of Gooman Bhunjun, the natural mother of the minor plaintiff, who has obtained a certificate under Act XL of 1858, has been substituted on the record in her place as the manager of these suits for the minor plaintiff.

Various objections were taken in the course of the trial in the lower Court, but they were all overruled, and the plaintiff's claims were decreed in all these five suits. Other suits of a similar nature were, we are told, also brought; but, on account of the smallness of the value of the properties claimed, they have not come before this Court on Regular Appeal.

Although it is not necessary that I should deal with all the points raised in these appeals, I think it my duty to do so, as it is not improbable that these suits, or some of them, will be taken in appeal to Her Majesty's Privy Council. In dealing with these cases, it is preferable that they should be first of all taken up together on points common to all, and that afterwards the facts peculiar to each should be considered.

The first objection taken is to the validity of the adoption, and whether the plaintiff is the lawfully adopted son of Aree Bhunjun [illegible]. That Aree Bhunjun was himself a minor, about 15 years [illegible], when he is said to have adopted the child Delputti would render adoption invalid. Mr. Justice DWARKANATH MITTER (Justice PAUL concurring) in the case of *Rajendro Naran*

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

PEINSEP, *J.*

Takore vs. *Saroda Soonderi Debia*, 15 W. R., 548, has stated the law in this respect, and this case has been quote approbation by their Lordships of the Judicial Committee Privy Council in the case of *Janunoona Dassia Chow* vs. *Ram Soondari Dassia Chowdharie*, L. R., 3 I. A (see p. 83). The point for our consideration is, whether Bhunjun did take the boy Delputti from his father G Bhunjun and adopt him, and whether he did authorize his married wife, Bishanath Koer, to perform the religious monies usual on such occasions which, from the nature illness, he could not himself perform. Now, in consi the evidence on the record, we have not the advantage of ing by the Subordinate Judge, who himself heard that evi Unfortunately the Subordinate Judge, before whom th took place, was removed to another Court before he de judgment, and his successor did so with merely the records him, assisted by the arguments of the pleaders. I have, the less hesitation in differing from the judgment of the lower on the facts connected with the adoption.

The story told for the plaintiff is very singular. Aree Bh a boy of 15 years, when bringing home his newly-married from her father's house, was attacked with cholera. He re his own village Dulleepore, and was taken to the house of Ram Tewaree, his teacher, as it was not a propitious tim him to enter his own house. He arrived at about 9 A.M died next morning. It is stated that at about noon he req his brother, Gooman Bhunjun Singh, to give him his third Delputti Singh, to adopt; that Gooman went to his own told his wife Asman Koer, and took the boy to where Aree jun was lying sick; that Aree Bhunjun took the boy Gooman into his own lap, requested those who were pres withdraw, as his wife was coming, and that he then told h that he had adopted the boy and requested her to have the ceremonies performed. Aree Bhunjun died early next m and two months afterwards his widow Bishanath Koer pe the religious ceremonies usual on the occasion of adoption

Now, apart from the character of the evidence by w supported, this narrative of events is most singular.

distance of time, (for about 10 years passed before these suits were brought,) it is no doubt extremely difficult to learn with any degree of certainty how far the cholera had advanced at the time when Aree Bhunjun is said to have made this adoption. The witnesses for the plaintiff, on the one hand, state that, though attacked with cholera at some distance from Dulleepore and passing liquid stools, he was perfectly conscious, and did not vomit until night, while those for the defence state that he arrived at Rajah Ram Tewaree's house in a state of collapse and insensible. But it is a matter for serious observation that none of those who, as the nearest relatives of the deceased Aree Bhunjun, would be best able to speak to his condition, and the fact connected with the adoption of Delputti and no medical man, though three, a Boidh, a Hakim, and a Purkhit Brahmin, attended him, have been examined for the plaintiff. Gooman Bhunjun died of cholera on the day after Aree Bhunjun's death; but when the suit was under trial, Aree Bhunjun's widow, Bishanath Koer, and his elder brother, Reet Bhunjun, were alive. There were also, no doubt, members of the household of Rajah Ram Tewaree, in whose house these events are said to have taken place; and, as the marriage of Aree Bhunjun, and the bringing home of his wife must have brought together many of his relatives and kinsmen, and his sudden sickness and death must at least have aroused their curiosity, if not their sympathy, it is almost incredible that the plaintiff should have been unable to produce any of those persons to establish the present claims. It is true, that from his position as guardian of Aree Bhunjun, and from his being as such, concerned in the transactions which it is now sought to nullify, there may be some objection to the examination by the plaintiff of Reet Bhunjun Singh, but it should also be recollected that he was not the prime mover in those transactions, inasmuch as he left their management entirely in the hands of Gooman Bhunjun; the objection, therefore, loses all its force. Mr. Woodroffe, who appears for the plaintiff, respondent, endeavours to explain away the absence of Bishanath Koer by attributing it to the reluctance of ladies of rank in this country to subject themselves to examination, even by commission, with the intervention of a purdah;

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

PRINSEP, J.

but I think that this explanation is of little value, looking to the vital importance of her deposition and comparing her silence with the fact that the widow of Gooman Bhunjun Singh, Asman Koer, has been examined, not only in these suits, but on the two former occasions. The absence of relatives has been by no means explained, and I cannot but feel that there is considerable force in the comment of the learned Advocate-General, who appears for the defendants, appellants, when he maintains that they have not come forward because they could not support the adoption set up.

(The learned Judge then examined the evidence as to the adoption, and came to the conclusion that Aree Bhunjun did not himself adopt the boy Delputti.)

It now becomes necessary to consider the objection raised by the defendants that these suits are barred by limitation, and to determine what is the effect of the sanction of the Judge under section 18, Act XL of 1858 having been given to the sales which it is the object of these suits to set aside.

That these suits fall within Act IX of 1871, Sched. II, Article 15, as being suits to "set aside an order of a Civil Court in a proceeding other than a suit," is not now pressed upon us, though it was raised in the lower Court. I have no doubt that this article does not apply, and that the sanction of the District Judge under section 18, Act XL of 1858, is not an order of the nature contemplated by that Article.

It is next contended that these suits are barred by Article 92 of the Limitation Act of 1871, inasmuch as they are suits to "cancel or set aside an instrument not otherwise provided for by that Act."

If these suits are of this nature, it will be necessary to consider how far the minority of the present plaintiff and of Aree Bhunjun is any protection, that is, whether Aree Bhunjun having died a minor and under a disability to sue, and being succeeded by a plaintiff who is still a minor, and now sues through his guardian, the second and succeeding disability continues to suspend the operation of the law of limitation, for, if the second disability is not recognized by law, and these suits are governed by Article 92, they are clearly barred having been brought long after three years from Aree Bhunjun's death.

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

PRINSEP, *J.*

It is, however, unnecessary in the view I take, for me at present to consider this last-mentioned point, because, in my opinion, these suits are not governed by Article 92, but by Article 145 of the Limitation Act.

The object of the suits is, in my opinion, to show that the sales which it is sought to set aside were made unlawfully, that is, not for purposes legally binding on the minor, and that, therefore, possession taken under those sales was unlawful.

The fact that a guardian may have improperly sold property belonging to his ward, and may have embodied this transaction in a written instrument, cannot, in my opinion, affect the position of a minor seeking to recover that property merely because a written instrument was executed. That instrument is between the guardian and a third party. If the guardian has exceeded his authority, the instrument is not the act of the minor, and it would not be incumbent on him to sue to set it aside, as in the case of one who has himself executed an instrument the validity of which he impugns. The fact that the District Judge, on the application and representation of a guardian under section 18, Act XL of 1858, may have sanctioned an alienation cannot, in my opinion, affect the present cases, except in so far as it may rightly be considered as a general rule to throw the *onus* on the plaintiff to show that alienations were improperly made, contrary to the usual rule requiring the purchaser to establish the validity of the alienation, or, that he acted with due care and caution after making such enquiry as an honest and prudent man would make. In all these suits, however, the defendant's purchasers are the creditors (or rather their heirs), whose debts were satisfied by these alienations, and, therefore, in my opinion, they could not be placed on the same footing as strangers who were unaware of the real state of the family, and the nature of the debts to be liquidated.

It cannot be denied that a stranger purchasing from a guardian acting under authority from the District Judge under section 18, Act XL of 1858, would be entitled to every protection in our Courts so long as it is not shown that he acted in a fraudulent or collusive manner, knowing that the debts for the liquidation of which the purchase money would be applied, were

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

PRINSEP, *J.*

not debts lawfully binding on the minor. The burden o would in such a case be heavily on any one seeking to s such an alienation. But whereas in the present case, t chasers were themselves the creditors of the family whose it was the object of these alienations to liquidate, it app me that, inasmuch as they have the means of satisfying a as to the origin and nature of those debts, and how t binding on the minor, the burden of proof is shifted on shoulders as soon as the plaintiff has established a *prin* case. We should not in such a case exact from a plaintiff t amount of proof as in the case first put. In every one cases now before us the defendants are either the actu chasers or their heirs, and in some of these cases the def are men of business, money lenders, or bankers who n unreasonably be considered to have at hand evidence nature just stated. They may have paid some money i transactions, but the question before us is, whether the sufficient and proper enquiry, or had means of knowing w the money was to be applied in payment of debts for whi minor's estate was liable.

Having stated what I consider to be the relative p of the contending parties, I now propose to state what to me to be the manner in which we should deal wit proceedings taken by the District Judge on the appl made to him for his permission under section 18, Act 1858. The law allows an appeal against any order passed this Act, but with respect to an order under section 18, p ting an alienation, this provision would obviously be a dead because there could be no party dissatisfied with the passed who could appeal. Any friend of the minor who be inclined to interpose to prevent a fraud could not ta place of an appellant in proceedings to which he was no The only protection that the minor would have agai improper alienation of his property by his guardian would the District Judge made full enquiry before according hi tion thereto. But it must be recollected that the Distri has before him an *ex-parte* case, and that with every de for the interests of the minor, it is impossible for him

acquainted with the exact state of affairs. Any orders that he may pass can only have reference to the case laid before him, and on discovery of other matters it would surely be competent to the minor, on attaining his majority, or to another person, as in the present case, acting on his behalf, to bring a suit to have the matter reconsidered. Of course in such a case a third party purchasing in full confidence on the Judge's sanction to the alienation, would be protected under ordinary circumstances; but in the present case the purchasers are creditors who would be able to judge for themselves how far the minor's estate was liable to satisfy the particular debts. Then, if we examine the Act (XL of 1858) itself, we find that every order passed by a District Judge is open to appeal. If he refuses to sanction a sale of any property of a minor, the guardian can take the case in appeal to a Superior Court; but if, through inadvertence, through a misapprehension of the position of the minor, or through misrepresentation of the parties concerned, the Judge sanctions an alienation of property belonging to a minor, there is no appeal because no one could appear as appellant. It surely cannot have been the intention of the legislature to give more force to such an order of a District Judge than to any other order that he might pass under the Act. That would not have the effect of protecting the minor's estate. It appears to me that the entire case upon which an alienation of property belonging to a minor was sanctioned by a District Judge can, in a regular suit, be considered if the minor, on attaining his majority, or if, as in the present case, another representing the minor as his guardian, thinks that such alienation has been wrongly permitted, and that the minor was not liable to satisfy the particular debts which the District Judge in the *ex-parte* case before him held, were binding on the estate. The Court trying such a suit would be entitled to consider the evidence on which the District Judge proceeded and any other evidence. But it has been stated that such a suit might be brought in a Court inferior to that of a District Judge, and that consequently a Subordinate Judicial officer would have to express an opinion regarding the correctness of the order of a superior tribunal. That is not unusual in our present judicial system, and many cases of this

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

PRINSEP, J.

description could be cited, so that this objection is of little value.

To show the nature of the enquiry made by the District Judge, I have only to refer to his proceedings, which have been already detailed. His enquiry was of very summary character so far as the minor's interests were concerned. No attempt apparently was made to distinguish between the debts due from the minor's estate and from his guardians, though, by the deed of partition executed by their father in 1849, separate properties were assigned to each, nor was an attempt made to show in nearly every instance, when the debts were incurred, and how the minor was liable. No doubt the affairs of the family were much involved when the application was made to the Judge in 1864, but so they were in 1849, when the partition was effected; and it was therefore most necessary to distinguish between the debts prior and subsequently, and those for which the brothers were jointly or separately liable. All these are points which, from the nature of the case, should have attracted special attention; but they have received no remark from the District Judge, nor, as I have stated, so far as the record goes, was evidence laid before him. But it will be necessary to examine those proceedings more minutely when each case comes separately under consideration.

I have already referred to the fact that the defendants, the purchasers, and present possessors of the properties which it is the object of these suits to recover, are the creditors whose debts were satisfied, or their immediate heirs, and also that many of them are men of business, money lenders, or bankers with whom the family has dealt for some time past. It is, therefore, easy for such persons to produce their books, and their servants to show the origin and nature of these transactions; but they have not done so. The evidence adduced is of an extremely meagre description consisting of oral evidence of a very general and unsatisfactory character, and decrees and deeds which will be presently mentioned. No account books have been produced, nor is there any evidence of the parties themselves or of their chief managers.

It is right, however, that I should state that no objection has been made to the adequacy of the consideration entered in the

deeds of sale as not properly representing the full value of the properties sold.

I attach no importance to the fact which has been prominently noticed that there are no reported cases of suits brought to recover property alienated with the District Judge's sanction, under section 18, Act XL of 1858, for we have no means of knowing, in how many instances, such sanction has been given. Speaking from an experience of about ten years as a Judge in important districts, I can state that I do not recollect giving such sanction except in two or three instances. Then again we do not know whether such suits have not been brought and compromised instead of being fought out to the bitter end in the last Court of appeal.

The learned Advocate-General has pressed on us that a recital in a deed would be conclusive, or at least satisfactory evidence of a necessity for contracting a debt binding on a minor or a member of a joint family. I am prepared to admit that such a recital is some evidence that the fact recited was present to the minds of the parties to the transactions; and, further, that the absence of any such recital in a deed would probably make it more difficult for the party on whom the burden of proof lay to establish the existence of a legal necessity. But I cannot accept a mere recital in a deed as evidence sufficient to establish the fact so recited. In the case of *Sunker Lall* vs. *Judoonee Suhaye*, 9 W. R., 285, Sir BARNES PEACOCK, Chief Justice, held that a recital in a deed that the money was borrowed by a Hindu widow for the performance of her husband's *shaddh* was no evidence of the fact in a suit against the husband's heirs, or to charge the estate.

I now proceed to consider how far in each case, taken separately the plaintiff has shown, that the alienation which he impeaches was not to satisfy debts for which he can properly be held liable.

The deed in Appeal No. 132 is dated 9th August 1864, and conveys to Lalla Jugendur Dass the whole of Mouzah Shahpore, Puttee Shahpore, *alias* Shahpore Gopalpore, which belonged to the two guardians, Reet and Gooman, as well as to the minor Aree Bhunjun.

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

PRINSEP, J.

It would seem that decrees were passed on 26th January 18 and 3rd December 1850, against Doyal Singh, the father of minor, and his two guardians; that on their being unable satisfy them, the latter, on their own behalf, and on behalf their minor brother, on 1st June 1859, executed a bond un which payment was to be made by instalments, and cert villages including the property now sold, was mortgaged. money not being paid, execution of the decrees was taken and attachments were made, and it was to satisfy these dec that the instrument in this suit purports to have been m Out of the consideration money (Rs. 37,500) Rs. 36,350 stated to have been applied to satisfy these decrees, Rs. 200 w expended in the purchase of a stamp for the deed of sale, Rs. 950 were paid in cash in satisfaction of other decrees.

The Subordinate Judge has commented on the fact that th decrees were 18 and 14 years old, and that there is noth to show that they were not barred by limitation, or could have been satisfied without selling the minor's share. He s remarks that there is nothing to show that the balance (Rs. 9 paid in cash was spent by the minor.

It is sufficient, in my opinion, for the purposes of the pres suit, that these decrees should have been under execution, that the sale of the properties of the heirs of the judgme debtor Doyal Singh was imminent to satisfy debts incurred their father. It is asking us to presume more than I sho feel justified in presuming to hold, that because the decrees w passed many years ago they were barred by limitation, altho they were on the face of them unsatisfied, and the Court execution allowed execution to proceed. Nor would it be reas able even to suspect collusion between the decree-holders and guardians of the minor when in execution it was sought to the property of the guardians as well as that of their ward satisfy the debt of their father.

Mr. Woodroffe argued, and at one time I thought there was some ground for his complaint, that the Sub nate Judge, by excluding certain documents tendered in the Court, had prevented the plaintiff from proving certain pay but I find that they have been duly entered in favour

debtor, and there is no valid ground for objecting that evidence has been improperly excluded. Objection is next made to the calculation of interest in the account appended to the petition for execution made on 28th February 1863; but I do not find that there is any error. It has been overlooked that the lower rate of 6 per cent. was allowed in the instalment bond, but it was at the same time agreed by the judgment-debtor that, on default, the full amount of interest (12 per cent.), chargeable under the original decree, should be payable.

It will be more convenient to consider Appeals 133 and 137, (original suits 92 and 94) together, since the defendants, appellants, are the same in both cases.

In the first case, the consideration of the sale on which defendant relies consists of three items—(1) balance of Rs. 2,700, due to pay off a deed of conditional sale of Mouzah Shahpore, Puttee Shahpore, *alias* Shahpore Gopalpore, dated 28th October 1862; (2) Rs. 5,750 to pay off a portion of a decree dated 26th July 1864; (3) Rs. 7,640, the amount due under decree dated 26th March 1846.

The deed of conditional sale of the entire Mouzah Shahpore, Puttee Shahpore, *alias* Shahpore Gopalpore, was executed for Rs. 4,400 in favor of the appellant, then a minor, and his guardian (whose estate he has since inherited), they at the same time holding a zuripeshgee lease of that mouzah for Rs. 48,765, executed on 24th July 1860. Now both these transactions, so far as the minor plaintiff, respondent, is concerned, are open to the objection taken that they are void, because they were not entered into by the guardian with the previously obtained sanction of the District Judge under section 18, Act XL of 1858. *Primâ facie*, therefore, the minor's estate is not liable to satisfy these debts, and there is no evidence to shew that, though the zuripeshgee and the deed of conditional sale are not binding on the minor, he received the benefit of the monies, or that the monies were borrowed to pay off any legal demand. Indeed it is remarkable that these deeds contain no recital of any legal necessity for the contracting of these debts. The deeds are not only bad, because the Judge's sanction had not been obtained to them, but there is absolutely no evidence as to the nature of the debts for which these further debts were contracted. There is nothing on the proceedings of the District

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

PRINSEP, *J.*

Judge to show that he satisfied himself on this point, as he should have done; and we cannot, in my opinion, go beyond the record of those proceedings, and assume that the District Judge made any further inquiry and satisfied himself regarding these transactions.

The next portion of the consideration is the decree of the 26th July 1864; but that is, I think, open to the objection taken by the plaintiff, respondent, that it was passed on the admission by the guardians of a debt under a mortgage bond, dated 11th September 1862, which it is clear was executed without the District Judge's sanction under section 18, Act XL of 1858. That bond moreover has not been produced in the present suit, nor is there any evidence regarding it. It may be that that bond has been returned to the minor's guardian; but that has not been stated by the defendants, nor have they attempted to show the nature of the transaction and how it affected the minor. I, therefore, find myself unable to hold that this debt was binding on the minor.

I cannot, however, agree with the Sub-Judge in refusing to accept the decree of March 26th, 1840, as a valid debt binding on the minor's estate. That decree was against the minor's father Doyal Singh. There is no reason to suppose that execution of it was barred by limitation, but on the contrary there is evidence to show that it was executed from time to time so as to keep it alive. The original decree-holder, Teloke Ram, sold it to one Jai Ann who, on 15th December 1860, caused it to be executed. It was subsequently sold to defendant, respondent's father, Janaki Dass. We have not on this record the records of all the proceedings taken from time to time in execution of this decree; but we have an account prepared in the office of the Sub-Judge in 1[illegible] from which it appears that it was under execution in Dece[illegible] 1861 and later, for the account of monies due under it was [illegible] up on that date.

Mr. Woodroffe, however, draws attention to the fact that property which was mortgaged by Doyal Singh, and declared liable to satisfy the debt, was under the partition deed of reserved by Doyal Singh for himself; and that, in accepting properties allotted to them under that deed, Reet Bhunjan Gooman Bhunjan agreed to liquidate all the debts of their

Doyal Singh, whereas, although provision was made in case another son was born, under which Aree Bhunjun took, this provision was not coupled with the same liability to liquidate those debts. It appears to me that this is not the proper construction to put on this deed, and I have no doubt that Aree Bhunj un's share, which was equal to that of Gooman Bhunjun, and slightly less than that of Reet Bhunjun, the elder son, was subject to the same conditions as those imposed on the shares of his brothers. There is no possible reason suggested why any exemption should have been intended in favour of the unborn son.

If, therefore, the plaintiff had succeeded on all the other points in this case, he would be entitled to recover the property in suit only on satisfying the money due under this decree with interest up to date.

In appeal, No. 137, 5½ annas share of Shahpore, Puttee Shahpore, *alias* Gopalpore, was sold to defendant, appellant, and his uncle and guardian, whose heir he is, for Rs. 51,562, the consideration money being applied to pay off the balance of the conditional deed of sale, dated 28th October 1862, which was left after the payment made under the deed in appeal, No. 133, while the remainder was applied to paying off the zuripeshgee on the same property already referred to which was said to amount to Rs. 48,705. Neither of those mortgages have received the necessary sanction of the District Judge under section 18, Act XL of 1858; and, therefore, for reasons already stated in No. 133, I hold that they are not binding on the minor. I further remark as regards the zuripeshgee that no account apparently was submitted of the profits realized under it, and that the full amount of the principal claimed as if the usufruct of the estate only paid off the interest [illegible], and that to the very fraction of a rupee. But there is a fatal objection to the claim set up in this case, that it is barred by limitation. More than 12 years have passed since the execution of the deed of sale, and the sanction of the District Judge to that transaction, but it is argued that limitation should be calculated from the date on which the transaction was completed by the registration of the deed and payment of the full amount of consideration. There is no doubt that in this country possession is not given until this has been done; the law, however, declares that

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

PRINSEP, J.

the transaction shall relate back to the date of the execution of the particular deed registered. But in the present case the purchaser was in possession as mortgagee before this transaction, and to determine the commencement of his possession as purchaser, we must, in my opinion, consider what was the intention of the parties. Clearly they would contemplate a change in the title of the defendant from mortgagee to purchaser from the date of the deed of sale. Calculating limitation from this date, this suit is barred as it was not instituted within twelve years from that date, and the law (Act IX of 1871) does not, it has been held by this Court, allow a second disability to extend the term allowed for minors.

In this view of the law this claim should be dismissed as barred by limitation.

Appeal No. 134.—In this case a four annas share of mehal Jaipur, has been sold for Rs. 16,250 to Lalla Seekur Chund, who has been found to be the benamee of Mussummat Sri Ans Koer, Rs. 15,963 out of that sum having been applied to satisfy (1) a zuripeshgee, dated 3rd September 1861 to that lady; (2) a decree dated 17th June 1863; and (3) two bonds dated 4th July and 16th July 1864.

Now the zuripeshgee which was executed without the sanction of the District Judge under section 18 is void so far as the minor is concerned. But there are circumstances connected with it which would otherwise make me unwilling to hold that it is binding on the minor. It appears that it was executed to pay off Rs. 5,454 due on a bond executed only 28 days previously, and that a further sum of Rs. 6,046 was then also borrowed to pay off "debts due to Chowdhry Liakut Hossein and Bibee Amanut, the heirs of Basharut Ali, deceased, and for other necessary expenses;" but we have nothing to show what these debts were, or who these creditors were, or what these necessary expenses were. Then as to the bond, I find that it is recited that the money paid thereunder was to "liquidate the debts of the heirs of Sheikh Amiruddin Mahomed, and Thakoor Rash Behary Lall, auction-purchasers of Talook Jaipur, and Mitterjee, Singh, and to meet our special necessary expenses;" but as in the case of the zuripeshgee so in the case of this bond, is all information wanting regard-

se debts or *special necessary expenses.* Under no circum-
, therefore, in my opinion, could a minor be held liable on
eds unsupported by substantial evidence.

with respect to the decree of 17th June 1863, I observe
the face of it, it states that the minor shall not be liable.
ree is against Reet Bhunjun and Gooman Bhunjun and
rms expressly exempting the minor. We should not, in
nion, be justified in assuming that the District Judge
d himself from some evidence not on his proceedings, that
nor was liable to contribute to satisfy this decree.
s to me rather that this, like many other points already
d to, escaped his attention or was not brought to his

two bonds are both mortgages, and have neither of them
d the sanction of the District Judge under section 18 of
of 1858. One of these two bonds recites that the greater
of the money borrowed was to satisfy an indemnity bond,
rd September 1861, in favour of the obligor herself, the
Rs. 220 being required for the expenses of law suits, but
emnity bond is not produced, and the oral evidence regard-
s so unsatisfactory that I decline to credit it. In this case
chaser being herself the party in whose favour this indem-
nd was executed, should have had no difficulty in clear-
all the circumstances connected with it.

money was borrowed on the other bond (so it recites)
off the Government revenue due on the very mehal which
he subject of this case. The bond received the District
sanction, and there is no reason to suppose that the
was not required for and applied to this purpose. If the
had been otherwise successful, I should have allowed him
possession of the mehal only after paying off this debt,
terest, as I think that he must fairly be held to be liable
date it.

In this, as in No. 137, the claim is barred by limitation
reasons I have already given in dealing with No. 137.

No. 135.—In this case 4 annas share of Shahpore,
Shahpore, *alias* Shahpore Gopalpore, has been sold for
, which was applied partly (Rs. 13,835) to satisfying

V. 50

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

PRINSEP, *J.*

a decree, dated 16th February 1857, and partly (Rs. 23,501-7-3) to paying off a bond, dated 2nd March 1858.

Now this decree is, I observe, against Gooman Bhunjun alone, and it was passed to recover money due under a deed, dated 12th June 1850, which has not been produced.

The learned Advocate-General, in explanation of this, points out that Amni, the property said to have been mortgaged by that deed, fell within the share of Gooman Bhunjun under the partition deed of 1849, and he asks us to suppose that this accounts for Gooman's name alone being used in that transaction. I am not inclined to accept this explanation. The evidence is clear that on that partition of 1849 the brothers separated and have since lived separately, and this argument is entirely demolished when we remember that Gooman Bhunjun was not the sole proprietor of Amni, as the brother, Aree, was to receive a share of that and other properties made over to him.

Next, as to the bond of March 1859, it appears that it was executed by Reet Bhunjun and Gooman Bhunjun for themselves and Aree Bhunjun before the last-named had come under their charge, and while he was under the guardianship of his mother. There is, moreover, no evidence regarding this transaction.

The deed of sale itself, in its recital, is most general regarding the necessity for the transaction, merely specifying that it was made "to pay the amounts covered by the decrees and bonds which, from the time of Doyal Singh, ancestor of me, the declarant, my client, and the said minor have been due to Lalla Mohabeer Prosad (who is one of the purchasers) and others named."

The purchasers who were also the creditors have failed to show that there was any legal necessity for the sale of the minor's rights in the property, and when we turn to the application of the purchase-money which is detailed at the foot of the deed, we find, as has already been shown, that it was to satisfy debts for which the minor's estate was not responsible. If, therefore, the plaintiff had otherwise succeeded, I should have set aside the alienation in this case.

I have stated my opinion on all the points raised in these appeals, because it is not unlikely that appeals will be preferred to Her Majesty's Privy Council; but as I am of opinion that it

1879

RAJAH LALL v. DELPUTTI SINGH.

not been proved, that the minor is the lawfully adopted son Aree Bhunjun Singh, I am of opinion that on that ground e these suits should be dismissed.

Judgment.

TH, *C.J.* :—

GARTH, *C.J.*

s my learned colleague has explained the general facts of this more fully than I have, and as there are certain points in on which unfortunately we are not agreed, I have asked him e kind enough to deliver his judgment first.

ıe case is one, undoubtedly, which involves several difficult novel questions; and I desire in the first place to thank the ıed Counsel on both sides for the valuable assistance which have rendered us.

ıese appeals are preferred in five out of a larger number of , which have been brought by the plaintiff as the adopted of one Aree Bhunjun Singh, who died a minor, to recover ession of Aree Bhuujun's shares in several ancestral properties, h were sold many years ago to the principal defendants ieir ancestors under an order of the Civil Court.

ıere is no question that at the time when this order was , the affairs of Aree Bhunjun and his two brothers were in most involved and perilous condition. The family were ssed with a heavy load of ancestral and other debts.

ecrees for large amounts had been ontstanding against them nany years; the whole of the family estates had been mort- l to such an extent that no further money could be obtained them; the property was all under attachment; and unless immediate arrangement had been made for sale of a large on of it by private contract, there was every reason to se that it would be sold by public auction at a ruinous ice.

this state of things the two elder brothers, who were the leated guardians of their minor brother Aree Bhunjun, d to the Civil Court, under section 18 of Act XL of 1858, ave to sell the minor's share in certain portions of the ty, in order to save the rest, if possible, and so relieve the from their pressing difficulties. Particulars of the debts ubmitted to the Court. Enquiries appear to have been

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

GARTH, C J.

made, and explanations given to the Judge as to the necessity and propriety of the sale; and eventually the Judge ordered that a sale should take place, and that the deeds of conveyance should be submitted to him for his approval. The properties now in question were all sold under this order; and the Judge signed his name on each of the deeds, in token, as I think we must presume, that he approved of the terms of the conveyance.

The deeds were all executed on the 9th or 11th of August 1864; and registered a few days afterwards on the 22nd of August.

Aree Bhunjun Singh died about three years after this transaction; and on the 21st August 1876, just in time, as it is contended, to save the twelve years' limitation, and when some of the purchasers were dead, these suits were brought to recover back Aree Bhunjun's share of the properties sold, by Mussamut Bishanath Koer, the widow of Aree Bhunjun, as the adoptive mother and guardian of Delputti Singh, Gooman Bhunjun's third son, who is alleged to have been adopted by Aree Bhunjun on his death bed.

The plaints are all in much the same language; and the grounds upon which the claim is made are the same in each suit; namely, that Aree Bhunjun's two brothers, Reet Bhunjun and Gooman Bhunjun, were simpletons and ignorant of business, and helpless in the hands of their servants, and that they fraudulently and illegally sold the property in each case, to satisfy personal debts of their own, with which the minor had no concern. Not a word is said in the plaints as to the sales having been made under an order of the Civil Court.

The material issues raised in the Court below were as follows:—

1*st.*—Whether the suits were barred by limitation?

2*nd.*—Whether Delputti Singh was legally adopted?

3*rd.*—Whether the sales were made to satisfy personal debts of Aree Bhunjun's two brothers, or for a legal and proper consideration?

The Subordinate Judge decided the first two questions as to limitation and adoption, in the plaintiff's favor. He treated the order made by the District Judge for the sale of the property, and the proceedings upon which that order was founded, as if

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

GARTH, *C.J.*

they were so much waste paper. He held that, notwithstanding that order, the *onus* lay upon the defendants (the purchasers or those claiming under them) in each case to show that the consideration for the deeds were debts or sums due from the minor, and that in other respects the sales were such as the guardian had a right to make. Upon this principle he dealt with the evidence in each transaction, and decided all the cases in favor of the plaintiff.

The first point raised before us on appeal, as regards limitation, was disposed of during the argument. It is clear that these were not suits to set aside the Judge's order for sale, and consequently that it was not necessary for the plaintiff, (under Article 5 of the Limitation Act), to sue within one year from the date of that order.

The second point raised as regards limitation, was one about which during the argument I had some doubt, namely, that as the plaintiff could not recover his property, so long as the deeds by which it was conveyed continued in force, the primary object of these suits was to set aside the deeds; and that therefore they should have been brought, (under Article 92 of the Limitation Act), within three years from the time when the deeds were made.

But I am glad to have come to the conclusion that this is not right. It would be very hard upon minors in many cases to be allowed only three years to bring a suit of this kind; and when we consider that in this instance the minor himself was no party to the deeds, and that he is disputing the legality of the transaction, I think he has a right to sue, and does in fact sue, in all these cases, to recover possession of the property sold; and if it were necessary for him to say anything in his plaint with regard to the deeds, it would only be to ask the Court, (as was done in the case of *Bennett* vs. *Hamill*, which I shall mention presently) to restrain the defendants from setting up the deeds in answer to his claim.

The substantial object of the plaintiff is to recover the property; and the validity or invalidity of the sales forms only one of the questions which are involved in that claim.

The third point as regards limitation, *viz.*, whether the suits

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

GARTH, *C.J.*

are in time, assuming 12 years to be the proper period, I shall dispose of when I come to deal with each transaction separately.

As to the alleged adoption of the plaintiff, I agree in the conclusion arrived at by Mr. Justice PRINSEP, and mainly upon the same grounds.

(The learned Chief Justice then dealt with the facts as regards the adoption.)

This finding would, of course, dispose of all the five suits, but as it is possible that the plaintiff may desire to appeal to a higher tribunal, I think that we ought to decide the other points which have been argued before us.

And first, we have the very important question, how far Act XL of 1858, and especially the 18th section of it, has had any and what effect upon suits of this nature.

There is no doubt that previously to the passing of that Act a purchaser buying immoveable property of a minor was bound to enquire into the circumstances which rendered the sale necessary, and to satisfy himself, as an honest man, of the existence of such necessity. He knew, or was presumed to know, that the minor's guardian had no right to sell or mortgage the property except for special reasons; and the existence of those reasons formed under such circumstances one of the elements of the purchaser's title. (See *Hunooman Pandey's* case, 6 Moore's I. A., 423; *Lalla Bunseebur* vs. *Koonwar Dutt Singh*, 10 M. I. A., 471), and so before the passing of that Act, where a suit was brought by a minor on coming of age to recover property sold by his guardian during his minority, it was generally incumbent upon the purchaser to prove that he acted in good faith; that he had made proper enquiries as to the necessity for the sale; and had honestly satisfied himself of the existence of that necessity. (See *Roop Narain Singh* vs. *Gujadhur Pershad Narain*, 9 W. R., 297; *Syad Lootf Hossein* vs. *Dursun Lall Sahoo*, 23 W. R., 424.)

The reasons why the *onus* was thus generally thrown upon the purchaser is explained in *Hunooman Pandey's* case to be based upon this principle, that the circumstances under which the sale took place, and which made it necessary, must be presumed to be rather within the knowledge of the purchaser than of the minor,

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

GARTH, C. J.

who was often quite a child at the time of the transaction; and the same reason is thus given by the Court in *Syad Lootf Hossein's* case, "as the sale was made during the minority of the plaintiff, at a time when he could know nothing of the circumstances of the case, it was obligatory on the defendants to prove, that when the original loan was taken from the widow, it was taken for the benefit of the infant."

This rule, however, is not always applicable. (See *Omed Rai* vs. *Heera Lal*, 1 S. D. A., N. W. P., 618, referred to by the Privy Council in *Hunooman Pandey's* case.) Their Lordships there expressly say, that the question on whom the *onus* of proof lies in suits brought by an infant to recover property improperly sold or mortgaged, "is one which is not capable of a general or inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by, and dependent on them."

This being the state of the law previously to the passing of Act XL of 1858, let us see, whether the Act has made any and what difference in that respect.

Now the Act, as it seems to me, is intended to place the persons and property of all minors, whose guardians may obtain a certificate, under the special charge and control of the Civil Courts.

We have lately held here in a Full Bench of this Court (see *Ram Chunder Chuckerbutty* vs. *Brojo Nath Moozoomdar*, 4 Cal. Rep., 247) that it is not necessary for *all guardians* to obtain such a certificate, and that an uncertificated guardian has the same rights and obligations as regards the minor and his property since the Act, as he had before it passed. But in the case of minors of large property, especially immoveable property, the Act renders it very desirable (although not absolutely imperative) that their guardians should obtain a certificate, and thus place themselves under the protection and authority of the Court. The Act gives such guardians larger powers in some respects than are possessed by uncertificated guardians. It imposes upon them certain duties, such as the education of the minor, the rendering accounts, &c. (see sections 16 and 25); and it forbids them to sell or mortgage the minor's immoveable property without an order from the Court.—Section 18.

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

GARTH, *C.J.*

This last provision, in my opinion, was intended to effect, and has in fact been the means of effecting, a manifest improvement in the law.

The powers exercised by guardians of minors under the Hindu Law had given rise to great inconvenience, and been productive of much fraud and litigation.

A Hindu guardian, let him be ever so honest, was often in doubt and difficulty, as to how he ought to deal with the minor's property under circumstances of pressure. The family might be very seriously in debt. It was often a doubtful question, both of law and fact whether the minor was liable for any and what portion of the family debts, or whether the necessity was sufficiently urgent to justify the sale or mortgage of the minor's immoveable estate. The guardian was oftentimes a *purdah nasheen* lady or some other member of the family entirely ignorant of law and business, and of the true state of the family affairs, too often guided by the advice of some unreliable mooktear, and under the influence of other members of the family whose interests might be adverse to those of the minor.

The minor's possession, even under these circumstances, was sufficiently unfortunate, but it was of course still more so, if the guardian himself, as not unfrequently happened, was a dishonest man, whose interest and whose object was to sacrifice the minor's property to his own advantage.

No wonder that in this state of the law the estates of minors were so constantly sold and mortgaged without any legal necessity. No wonder that when brought to sale, they were sold at a ruinous sacrifice. No wonder that the purchasers of those estates, as well as the minors themselves, should so often have been the victims of fraud and ignorance, and that dealings of this kind with the property of minors should have proved such a fruitful source of litigation.

It was to remedy these evils, I conceive, and to assimilate the law in this country more closely to the English law upon this subject, that section 18 of Act XL of 1858 was enacted. It was intended by this section not only to protect the interests of minors, but to throw upon the Civil Courts a large

f the duties and responsibility which had previously
rown upon guardians, and to which the latter had been
a rule deplorably unequal.
ivil Court has now not only the power, but it is bound,
nsider, under that section to enquire into the circum-
of each case, and to determine whether, as a matter of law
dence, it is right that any proposed sale or mortgage of
r's property should take place. The Judge may require
dian to produce any evidence, or to afford any informa-
articulars to enable him to come to a just conclusion;
he Court, upon the materials and information brought
by the guardian, makes an order for sale, I think that
ser, who buys in good faith under that order, acquires
title to the property sold, unless the minor or those
under him can show at some future time that the sale
dulent or improper.
pears to me, that construing the section in this way, its
s are calculated to prove most beneficial. The property
s is thus no longer left to the mercy of dishonest or
guardians. It is protected by the Court from aliena-
ept in cases of real and legal necessity; and as *bonâ fide*
rs may thus acquire the property with some confidence
lidity of their title, they are naturally prepared to give
ir and adequate price.
rings the law of this country in the case of certificated
much more nearly upon a par with the law of

at law, neither the minor himself nor his guardian
power to dispose of his real property without the
of the Court, and the Court as a rule never or-
sale of such property, merely because it may be
to the minor, but only in case of urgent pressure
ity. (See Simpson on Infants, pp. 324 and 352, and
rities there cited). The means by which the sanction
urt is usually obtained for such sales is by a suit
a creditor of the estate; and an enquiry then takes
e the Court or one of its officers, to ascertain whether
sale under the circumstances is legal and proper.

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

GARTH, *C.J.*

If, upon this enquiry, a decree is made for sale, a purchaser buying in good faith under the decree acquires a valid title as against the minor himself, and all other persons who may be parties to the suit, or bound by the decree, and the title so acquired cannot afterwards be impeached by any of those parties, except by showing that the decree was illegal, or else obtained by fraud.

The law upon this subject is exemplified and very clearly explained in the case of *Bennett* vs. *Hamill* (2 Sch. and Lefroy, page 576) which was decided by Lord REDESDALE in the year 1806.

The plaintiff in that case, whilst he was a minor, was entitled to certain leaseholds for lives as his father's heir. His mother, Mary Bennett, was appointed his guardian by the Court of Chancery. The plaintiff's father, when he died, was indebted to two persons named Palmer and Williams, for the amounts of certain judgment debts. William Johnson, the plaintiff, obtained from Palmer and Williams an assignment of those debts, and then in 1774, filed a Bill in Chancery against the plaintiff, and Mary Bennett (his mother) alleging that £329 was due to him upon those judgments, and praying that an account might be taken, and that the plaintiff's interest in the leaseholds might be sold to satisfy his debt. Mary Bennett, the guardian, put in an answer, admitting the allegations in the Bill, and stating that she had no assets of her husband's, except the leasehold property, out of which the debt could be satisfied; and that it would be for the benefit of the plaintiff himself, that his interest in the leaseholds should be sold.

The case was referred to the Master, who made his report, and upon that report a decree was made by the Court in May 1774, for the sale of the plaintiff's interest in the property.

Under this decree the leaseholds were sold to one Hart for £375, who died soon afterwards, leaving his son Simon Hart his heir-at-law. Simon Hart then conveyed the property to one McCaun, who afterwards sold it to Hamill.

In 1792 the plaintiff came of age, and in 1795, he filed a petition in the cause of *Johnson* vs. *Bennett*, alleging several errors and irregularities in the proceedings, and praying that the original decree, the Master's report, and the final decree

should be set aside; and the Lord Chancellor upon that petition made an order setting aside the decrees as prayed.

The plaintiffs then on the 21st March 1796, brought this suit against Hugh Hamill, Simon Hart, Mary Bennett (his mother) and the personal representatives of William Johnson, impeaching the decree and sales of 1774, as being both fraudulent and erroneous, praying in effect, that he (the plaintiff) might receive possession of the property and title deeds; that Hart and Hamill might account to him for the rents and profits; and that the defendants might be restrained from setting up the deeds of conveyance which were executed in 1774 under the authority of the Court as an answer to this Bill.

The case was referred to the Master to inquire into all the circumstances of the suit, and of the sale of 1774; and the Master made a report, which Lord REDESDALE considered to establish a case of fraud as against Mary Bennett and Johnson, but not as against Hart and Hamill, the purchasers.

The proceedings, however, of 1774 disclosed several serious errors and irregularities, which it was contended were sufficient in law to justify the Court in setting aside the sale to Hart, and on this part of the case Lord REDESDALE in his judgment says as follows:—"The principal question in the case, with respect to Hamill and the executors of Hart, is one of considerable importance, whether a sale under a decree of a Court of equity is to be impeached on the ground on which this is sought to be impeached."

Then after pointing out the errors and irregularities which had occurred in the proceedings of 1774, and that there was good reason to suppose that these proceedings were fraudulent, and intended, between Mary Bennett and Johnson, to cheat the minor, his lordship proceeds:—"Now on that subject I must confess, after considering this a good deal, I think it would be too much to say, that a purchaser, under a decree of that description, can be bound to look into all these circumstances; if he is, he must go through all the proceedings from the beginning to the end; and it is the opinion of the Court that the decree is right in all its parts, and that it would be impossible to alter it in any respect. These cases warrant no such opinion. On the contrary, as far as

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

GARTH, C.J.

I can find, the general impression they give is, that a purchaser has a right to presume, that the Court has taken the steps necessary to investigate the right of the parties, and it has in that investigation properly decreed a sale. Then he is to see that this is a decree binding the parties claiming the estate. He has no right to call upon the Court to protect him from a title not in issue in the cause, but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate his title although the decree may be erroneous, and therefore, to be reversed, I think the title of the purchaser ought not to be invalidated. If we go beyond this, we shall introduce doubts in sales under the authority of the Court, which would be highly mischievous.

"A case came before Lord ELDON, which was much debated on a variety of points, and fully considered by him in all its parts; and where the irregularity in the proceedings was far beyond what occurs in the present case, yet he conceived that the title of the purchaser could not be impeached on these grounds, and that he had a right to be protected, for that the purchaser had a right to presume that the Court had done right. (*Lloyd* vs. *Jones*, 9 Ves. Jun, 37).

"Lord ELDON seems to have been clearly of opinion that mere irregularity, such as was in that case, without making out a case of fraud and collusion of some sort or other in the purchaser, was not sufficient to affect the purchaser.

"In this case, therefore," said Lord REDESDALE, "I think I cannot impeach the purchase made by Hart, much less that made by Hamill."

That case, which has since been a leading authority, is valuable to us in this case, not only as showing the effect of sales made under the authority of the Court in England, but also with reference to the question with which I have already dealt, *namely*, whether the three years limitation is applicable. Lord REDESDALE clearly treats a suit of this kind by the minor as one *to recover the property*, the Court being merely asked to prevent the defendants from setting up the deeds of sale as an answer to the suit.

The rule thus laid down by Lord REDESDALE was afterwards

approved and acted upon by Lord ST. LEONARD in *Bowen* vs. *Evans* (1 Jones and LaTouche, 178) where his Lordship says :—

"I am content to be bound by the rule which Lord REDESDALE laid down in that case," (*Bennett* vs. *Hamill*), and he has carried the rule against a purchaser as far as any Judge. His Lordship then cites several other authorities in support of his position (see *Kennedy* vs. *Daly*, 1 Sch. and Lef., 355; *Gifford* vs. *Gore Stackpole*, 1 Dow., 18.)

I think that the principle laid down in these cases, which appears to me not only consistent with justice, but also in accordance with the best interests of minors, is one which ought to guide us in the construction which we are now called upon to put upon section 18 of Act XL of 1858. If a minor is not subject to the Court of Wards, there would seem to be no better mode of protecting his property from improper alienation than by placing him under the protection of the District Judge, and making it the Judge's duty to decide in each instance, whether any proposed sale and mortgage of the minor's property is legal and proper.

The Judge is the highest judicial authority in each District. He understands, or ought to understand, matters of business. He is at least an independent gentleman, capable of forming an honest judgment, unbiassed by prejudice or favor; and he has the means, as far as anybody has, of obliging the guardian, who applies for leave to sell the property, to provide him with all necessary evidence and information.

If, under these circumstances, the Judge, upon whom the responsibility is thus thrown by the law, makes an order for sale, it seems to me in the highest degree unreasonable to say, that a party purchasing under that order is bound to make the same enquiry which the Judge has made, and to determine for himself whether the Judge has done his duty properly, and come to a right conclusion.

If this were so, a purchaser buying under an order of the Court would be under the same obligation, and would obtain no better title than if he had bought direct from an uncertificated guardian. Unless sales made under the authority of the Court are to have to some extent at least the protection which they have

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

GARTH, *C.J.*

in England, it seems to me, that the provisions of section 18 will only be made a snare to delude unwary purchasers; that these sales will be questioned and litigated almost as frequently as they were before the Act was passed; and that minor's estates can never be expected to sell (any more than they were before the Act) for anything like an adequate price.

That the public in this country have hitherto adopted the same view which I take of section 18, is manifest to my mind from this remarkable fact; that whereas before the Act sales made by guardians were a constant source of litigation in the Civil Courts, we have not been able to find a single case, reported or otherwise (even with the assistance of the able and experienced Counsel who have addressed us) in which a sale made by order of the District Judge since the Act passed, has ever been questioned in a Court of law; and this, notwithstanding that the Act has now been in force for upwards of 20 years.

My learned colleague seems to consider that sales made under the sanction of the Courts ought not to be of the same authority here as they are in England, because the Indian Courts have not the same means as English Judges have of arriving at a right decision.

The same might probably be said with truth of almost all decrees on orders which are made by the Courts in this country. No evidence here, whether oral or documentary, is, as a rule, so reliable as it is in England. And it is quite true, that under section 18 the evidence which the Judge would take need not be upon oath, and he might not have the power of compelling the attendance of witnesses or the production of documents, which a Judge would have in the English Courts. But probably the fact of the witnesses not being examined on oath would not make much difference; and I see no reason why the District Judge, if he performs his duty, and insists upon being furnished with all the requisite information, before he makes an order, should not have sufficient means (in the great majority of cases at any rate) to form a correct opinion. And the sources from which he would obtain his information, viz., the guardian of the minor and other members and advisers of the family, together with such accounts and documents as he might require, would be much the same here as in England.

In both cases, no doubt the Judge, however careful he may be, is liable to be deceived or mistaken, but in both he has the means of compelling the applicants to provide him with all proper materials, before he makes any order for sale.

In this particular instance my learned colleague seems to consider that the District Judge did not do his duty properly, and that he made the order for sale without being duly informed of the circumstances.

I must say, I do not think we have any right to say this. The matter was not a contested one, and the District Judge may have received a great deal of information, and examined a great many documents and witnesses, no mention of which appears upon the proceedings, and it is difficult for us to ascertain, (even if it were our duty to do so), what materials or information he had before him when he made his order.

We are bound, I think, to presume that he did his duty to the best of his ability, and whether he did or not, I think it clear that our present duty is to enquire, whether upon the evidence, which we have before us in these suits, the sales were illegal or fraudulent. But then I also consider that, as the sale took place under the order of the Civil Court, the onus lies upon the plaintiff to make out a *primâ facie* case, such as she has alleged in her plaint, of fraud or illegality; and to show that the debt or sum of money, which formed the consideration of the sale in each case was one for which the minor was not responsible.

Upon this principle I proceed to consider the grounds upon which each transaction is sought to be impeached, and I believe it will be found that the main difference between my learned colleague and myself is with regard to what constitutes such a *primâ facie* case, as the plaintiff is bound to establish.

First, then, as regards appeal 132 (Original Suit No. 95.)

We quite agree as to this case. The consideration for the sale was the amount of two decrees against Ram Doyal Singh, the father, for the payment of which Aree Bhunjun was no doubt responsible.

The Subordinate Judge has chosen to suppose, without any reason and contrary to the evidence, that the decrees upon which the debt was founded were barred by lapse of time, and that Aree

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

GARTH, *C.J.*

Bhunjun and his brothers were not bound by them. Why th brothers should have been guilty of such an act of wanton foll as to part with their own property, as well as that of the min at a time when they so sorely needed it, for no reason or cons deration whatever, it is difficult to imagine. As a matter of fac the decrees were in full force at the time when the deed was exe cuted, and the only point which Mr. Woodroffe eventually at tempted to press upon us with regard to the transaction, wa that the Subordinate Judge had improperly refused to admit some documents, which would have shown that certain sums by way of interest had been paid upon the decrees, and consequently that the amount of the debt, which formed the consideration for the sale, had been over-estimated. It turns out, however, that there is nothing in this point. The interest said to have been paid was in fact credited in the account between the parties, and even if we had reason to believe that the account was incorrect in that respect, that would have been no ground in my opinion for unripping the whole transaction in a suit of this kind, twelve years after it had occurred. If that were the law, there would indeed be no peace or security for purchasers of estates.

Then as to the Appeals 133 and 137, (Original Suits 92 and 94.)

The deed in No. 133 conveyed a 4 annas share of Mehal Jaipur 1st Kalum, and 4 annas of Mehal Jaipur 2nd Kalum, to Lala Janessur Dass (the son of Gonesh Lal) for himself and as guardian of Lala Chunder Kumar, his nephew, then a minor, who is the defendant in the present suit.

The consideration for this deed, as far as appears, was as follows :—1st, Rs. 2,700-8, being part of a sum for which a deed of conditional sale of another property (Shahpore) had been executed, professedly by or on behalf of the minor and his two brothers, on the 28th of October 1862; 2ndly, Rs. 5,759-8, being part of a sum of Rs. 27,029-4-3, for which a mortgage bond had been given to Lala Janessur Das, the purchaser, professedly by the minor and his brothers on the 26th of July 1864; and, 3rdly, Rs.7,640, being the amount of a decree obtained many years ago against Ram Doyal Singh, the father.

1*st*.—As regards the first of these sums (Rs. 2,700-8) it appears

that the conditional sale of Shahpore was executed in favour of the defendant Lala Chunder Kumar (then a minor) and his guardian, for Rs. 4,400; and that Shahpore was at that time subject to a zuripeshgee lease for securing Rs. 48,765, made professedly by the two brothers on behalf of themselves and the minor on the 4th of July 1860.

Neither the conditional sale, nor the zuripeshgee lease, had been made by order of the Civil Court under section 18; and it is therefore quite true, as the Subordinate Judge says, that those deeds were not binding upon Aree Bhunjun, the minor.

But from this the Subordinate Judge infers apparently as a necessary consequence, that the debt or sum of money, to secure which the conditional sale was given, could not have been due from the minor; and here, I think, he is wrong. He is confounding two very different things. The security which is given for the debt is one thing; the debt itself, or the sum to secure which the conditional sale was made, is another; and assuming the principle to be correct, that the plaintiff was bound to bring forward some *primâ facie* proof, that Aree Bhunjun was not liable to pay the debt or sum to secure which the conditional sale was given, it seems to me, that she has clearly not done this, merely by showing that the security itself was not binding upon the minor.

The Rs. 2,700 might have been an ancestral debt, or money borrowed to pay an ancestral debt or Government revenue, or to answer some other necessity, which would make the minor liable to pay it; and in that case he would not be less liable, because his brothers gave a deed of conditional sale to secure that money, which deed the minor afterwards thought fit to repudiate.

At the time when the sale took place, which is the subject of the suit, the deed of conditional sale had not been repudiated by the minor; and that deed, and the purchaser's rights under it, were cancelled at the time of the sale; so that we have no reason to suppose, from anything which the evidence discloses, that the minor was not liable to pay this Rs. 2,700.

The Civil Court must, I think, be taken to have found, when it made the order for sale, that the minor was liable to pay this

1879.

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

GARTH, *C.J.*

sum; and the plaintiff has given no evidence, as far as I can see, to show that he was not so liable or that the sale was improper.

Then Mr. Justice PAINEP says, and says truly, that the deed of conditional sale contains no recital, showing how the minor was liable to pay the sum secured, and that this omission itself is a fair ground of observation in favour of the plaintiffs. But, however such omission might have been used in the aid of the plaintiff's case, if she had given any proof at all of the sale being an improper one, I think that in the absence of any such proof the mere omission of such a recital in the deed is not sufficient to supply its place.

There is no *primâ facie* proof, therefore, as it seems to me, that the minor was not liable to pay the Rs. 2,700; or that the sale in this case was fraudulent or improper. And the next sum of Rs. 5,759-8 stands, in my opinion, upon the same footing. That sum, so far as appears, is a portion of a debt, to secure which a mortgage bond was given, on behalf of the minor and his two brothers, on the 10th of September 1862. That bond was also made without the sanction of the Civil Court, and was consequently not binding as against Aree Bhunjun, but it does not therefore follow that he was not liable to pay the money to secure which the bond was given, and the plaintiff has not attempted to show that Aree Bhunjun was not liable for the payment of this sum.

It is true that the bond itself is not produced; but the bond would in the ordinary course have been handed back to the vendors, when the deed of sale was executed, and if so, it would be in the possession of the plaintiff, and should have been produced by the plaintiff. There is no reason given why it should not have been produced, nor do any of the plaintiff's witnesses show that the plaintiff was not in a position to produce it; and here I may say, not only with regard to this particular transaction, but also as regards the other sales with which we have to deal in this important case, that I see no reason why Reet Bhunjun Singh, who is alive, and so far as we know, perfectly capable of giving evidence, should not have been called as a witness for the plaintiff.

Beet Bhunjun is the uncle of Aree Bhunjun and of Delputti Singh. He is residing in the same place, and, so far as we are aware, is on the best terms with the plaintiff and the rest of the family. He knows, or has the means of knowing, the state of the family affairs in the year 1864; and he probably knows as well or better than any one else, the circumstances of each case, which we have to consider. Moreover, as being the eldest member of the family, he would know where all the deeds, books of account and other documents are kept, which would throw any light upon these several transactions.

I consider, therefore, that he ought himself to have been called by the plaintiff; or at any rate that the plaintiff should have done her best to procure his attendance. But even if he were unwilling to appear himself, there is no reason why his Naib or other person or persons in charge of the family books, papers, and accounts should not have been called to explain from those documents, the circumstances of each sale.

It is said, I know, that Delputti Singh himself, on whose behalf these suits are brought, was a minor at the time when the sales were made, and that the plaintiff, his guardian, being a lady, and also a minor, must have been equally ignorant with himself. But in appeals 133 and 137 the present defendant was also a minor at the time when the sales took place; and in appeal 134, the defendant was a purdah nasheen lady. It may possibly be true, that the defendant's relatives in these cases may be able to furnish information which the defendants themselves cannot. But this may be equally true as regards the plaintiff and the plaintiff's family; and if we are to act upon the principle that the plaintiff is bound to give some *primâ facie* proof that the sales were fraudulent or illegal, it seems to me impossible under the circumstances to hold that the evidence which the plaintiff has given amounts to any *primâ facie* proof at all of the illegality of these sales, or that the explanation why further proof has not been given, namely, that the plaintiff herself and Delputti Singh were minors at the time of the sales, is reasonably sufficient to excuse or to account for no attempt being made to give further or better evidence.

As regards the last sum of Rs. 7,640 due under the decree

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

GARTH, C.J.

of March 26th, 1840, it is shown to have been part of a judgment-debt of Doyal Singh, the father, which was, of course, binding upon Aree Bhunjun, and it is also clear that that debt was due at the time of the execution of the deed.

I am of opinion, therefore, that no case against the defendant has been made out as regards this deed; and consequently, that even if the adoption had been established, the plaintiff would not have succeeded in this suit.

As regards appeal No. 137, (suit 94,) the deed was between the same parties as the last; the property sold was a 5 annas 6 pie share of an estate called Mouzah Shahpore, and it was dated the same day, namely, the 11th of August 1864. In this case the date of the deed will be found very material.

The consideration is stated to be:—1st, Rs. 2,557-8, the remainder of the sum of Rs. 5,258, the other part of which was to make up the consideration for the deed in the last case (appeal No. 133); and 2ndly, Rs. 48,705, the amount secured by the zurpeshgee lease of the 4th of July 1860.

In dealing with the consideration for this deed, I apply the same principles as I did with regard to the two first items of the consideration for the deed in the last case. The conditional sale and the zurpeshgee lease were both void, no doubt, as against Aree Bhunjun, as not having been made under an order of the Civil Court; but there is no evidence whatever that Aree Bhunjun was not liable for the sums which they were given to secure, or that any fraud or illegality was practised upon him in respect of the sale.

Upon this part of the case my learned colleague remarks that so far as appears, no account was taken of the receipts of the purchaser under the zurpeshgee. But, on the other hand, it is quite consistent with the evidence that such an account was taken. No charge of this kind was made in the plaint, and no evidence has been given of any fraud or impropriety in that respect. If there was any foul play, Reet Bhunjun and Gooman Bhunjun must, of course, have been the victims of it; and we cannot presume, in the absence of any evidence, that Reet Bhunjun and Gooman Bhunjun allowed themselves to be cheated, or that the District Judge would have sanctioned the sale unless he had been satisfied that the transaction was a fair one.

I think, therefore, that in this case also the suit ought to be dismissed upon its merits.

But then, there is another serious objection to this claim on the ground of limitation. The deed was dated, as we have seen, the 11th of August 1864. The suit was brought on the 21st of August 1876. So that, if the purchaser obtained possession when the deed was executed, the minor's dispossession would have occurred more than 12 years ago, and the plaintiff would be barred by lapse of time.

Now, with regard to all these deeds, it has been contended by the respondent, that as they were not registered till the 22nd of August 1864, it is not reasonable for us to presume that the purchasers obtained possession until after the registration, and if so, the plaintiff would be just in time. And in those cases, where we had no reason to suppose, that possession had been given before the registration, I am quite disposed to take that view. But in this case, and in appeal No. 134, we have the fact, that the purchaser had been in actual possession of the property previously to the date of the sale.

The deed of sale, when registered, took effect from the date of its execution by the vendors. The zurpeshgee debt having been discharged by virtue of the deed itself, the zurpeshgee was at an end from the time when the deed was executed, and the possession which the purchaser had under the zurpeshgee must, I think, be considered in law to have been a possession under the deed of sale as from the date of its execution.

It is true, that as against Aree Bhunjun, the zurpeshgee was paid. But even assuming the purchaser's possession to have been *wrongful* as against him, at the time when the deed was executed, I take it that from the date of its execution the purchaser's possession became rightful; and that (as a test of this) if a suit had been brought for mesne profits by Aree Bhunjun against the purchaser for the time during which the latter was wrongfully in possession of his share, he would not have been entitled to any mesne profits between the date of the deed and the date of the registration.

That being so, I think, that if there were no other objection in this case, the suit would be barred by limitation.

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment. GARTH, C.J.

Then as to appeal 134 (suit 91), the sale in that case is made by the two elder brothers, (acting for themselves and the minor), to one Lala Sekhar Chand on behalf of Mussamut Sri ANES Koer.

The property sold was a 4 annas share in Mehal Jaipur 1st and 2nd kulluma; and the consideration was a debt due to Mussamut Sri ANES Koer, amounting to Rs. 15,963, which was made up as follows :—

1*st*.—A sum due to her, for which she held a surpeshgee lease from the vendors, dated the 3rd of September 1861 ;

2*nd*.—The amount due on a decree (for Rs. 3,363,) obtained by her against Reet Bhunjun and Gooman Bhunjun, dated the 10th of Assar 1270; and

3*rd*.—The amount of two bonds, dated respectively the 4th and 16th of July 1864.

1. This surpeshgee lease was also void as against the minor, as having been made without any order of the Civil Court. The consideration for it was a bond debt of Rs. 5,454, and Rs. 6,046 in cash. The sum raised upon the bond was to pay off debts due to the heirs of Sheik Ameeruddin Mahomed and Thakur Rash Behary Lall; and the Rs. 6,046 was raised to pay off debts due to Chowdhry Leakut Kossim and Bibi Amanut, the heirs of Chowdhry Busharut Ali, deceased. The plaintiff has given no evidence to show who these persons were, to whom these debts were due, or what was the nature of the debts; but as the persons to whom they were due are said to be the heirs of other persons deceased, the reasonable presumption is, that they were debts not recently incurred, but probably of long standing; and the plaintiff has given no evidence, nor is there anything, as far as I can see, to induce us to believe, that the debts were not ancestral, or that Aree Bhunjun was not liable to pay them.

2. As regards that part of the consideration, which consists of the sum due under the decree of June 1860, I confess I have felt more difficulty. The decree itself upon the face of it certainly shows that Reet Bhunjun and Gooman Bhunjun were alone to be liable upon it, and that Aree Bhunjun was not to be liable. But the judgment-debt is openly stated in the deed as being a portion of the consideration money. There was at any

nte no concealment in the matter; and if the District Judge, who must be presumed, I think, to have known the terms of the decree, and who certainly knew the law far better than the purchaser, thought it right to sanction the sale for the consideration mentioned in the deed, it is difficult to say that as against the purchaser, who in this instance was a lady, the purchase ought to be set aside at this distance of time, because it may eem to this Court with its present very limited means of ascertaining the truth, that about one-fourth of the whole consideration for the deed was a debt not binding upon the minor.

3. The third portion of the consideration of this deed consists of a sum raised upon the security of two mortgage bonds, neither of which was made with the sanction of the Civil Court. The money borrowed upon one of them was for the most part to atisfy an indemnity bond, dated the 3rd September 1861, and the money borrowed on the other was to pay a sum due for Government revenue upon the property. This last would presumably be a debt for which Aree Bhunjun would be liable.

As regards the indemnity bond, no evidence was given by the plaintiff to show the nature of the bond, or upon whom the liability under it attached.

The bond itself would, in the ordinary course, have been anded over to the plaintiff's family, and if there was any thing n it which would assist the plaintiff's case, there is no reason, s far as I can see, why the plaintiff should not have produced it.

I think, therefore, that in this case also, if there were no ther objection to the claim, the plaintiff has given no sufficient roof to justify us in setting aside the deed as against the urchaser.

But here again, as it seems to me, the suit is barred by limitation.

Mussamut Sri Anss Koer, who was the real purchaser under the eed, was at the time of the purchase in possession of the proerty under the zurpeshgee lease of September 1861. This suit as brought more than twelve years from the date of the deed, and herefore for the reasons given in appeal No. 137, I consider the urchaser's possession under the deed must have commenced as om the date of its execution.

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

GARTH, *C.J.*

It only remains to deal with the appeal No. 135, (*ante* No. 93).

In this case the sale was made to Lalla Mohabir Pershad, Lalla Chuni Lal, Lalla Doorga Pershad, and Lalla Bimal Das, (the sons of Mahbun Lall) and to Mussamut Janki Koer, the mother and guardian of Baboo Udoy Chand, the minor son of Lalla Chuni Lall. The property sold was a 4 annas share of Mouzah Shahpore and Putti Shahpore; and the consideration was as follows:—

1*st*.—Rs. 13,835, being the amount due upon a decree, dated 16th February 1857; and

2*ndly*.—Rs. 23,501, the principal and interest due upon a bond, dated 2nd March 1858.

1. The decree of February 1857 was against Gooman Bhunjun alone; and the suit in which it was obtained was brought to recover money due under a mortgage deed of the 12th June 1850. That deed has not been produced; and if I considered that in these cases the onus lay upon the purchasers to prove that the sale was justifiable, I might be disposed to hold, that the purchasers had not done here all that they were bound to do. But considering, as I do, that the onus lay upon the plaintiff, to make out a *prima facie* case of fraud, I think that he has failed to do so. It is perfectly consistent with the evidence that the decree, although obtained against Gooman Bhunjun alone, might have been for an ancestral debt, which Aree Bhunjun was liable to pay. The deed upon which the decree was obtained is said to be a mortgage bond, charging one of the properties, which came to Gooman Singh under the partition made by Ram Doyal the father, and it is more than possible, that whilst that estate was in Gooman's hands, he mortgaged it for an ancestral debt due from his father, which by the terms of the partition, he and afterwards Aree Bhunjun, became liable to pay.

2. With regard to the sum secured by the bond of May 1859, it is said that it was executed by the two elder brothers for themselves and Aree Bhunjun, before they had obtained certificate of guardianship under the Act of 1858, and while Aree Bhunjun's guardian was his mother.

I quite agree, of course, that at that time they had no right

1879

RAJAH LALL v. DELPUTTI SINGH.

Judgment.

GARTH, *C.J.*

bind the minor by the bond; but it by no means follows that the debt for which the bond was given was one of which he was not liable. The plaintiff has given no evidence to show that the minor was not liable for it, and I see no sufficient reason to suppose that the Civil Court was wrong in this case in ordering the sale.

For these reasons I am of opinion, that all these appeals should be allowed; and that the plaintiff's suit should be dismissed in each case, with costs in both Courts.

GARTH, *C.J.* (*Prinsep, J.*, concurring):—

This appeal, No. 167, is preferred by one of the defendants in original suit No. 91, on the ground that as he was only the *benamdar* of his co-defendant, the appellant, in one of the five analogous appeals just disposed of (No. 134), he ought not to have been made liable for the plaintiff's costs in the Court below.

The decree of the lower Court has now been set aside by our order in the appeal No. 134; he is of course no longer liable for those costs; but as he need not have preferred a separate appeal for the purpose of gettting this relief, he is not entitled to any separate costs. The order requiring him to pay plaintiff's costs must be set aside.

[PRIVY COUNCIL.]

RUGHOOBUR DYAL SAHOO AND OTHERS . . . . .

1879 AND

June 25th. KISHEN PERTAB SAHEE . . . . . .

Alluvion—Temporary assessment of lands gradually accreted to permanent tenure—River, Sudden change of—Usage governing rights of proprietors of contiguous estates divided by a River—Regulation XI of 1825, section 2.

A temporary assessment of land gained by gradual accretion through the change in the course of a river does not reduce the interest of the person with whom the assessment has been made to an estate of a temporary and limited character, where such accretion is permanent, as being an increment to an estate which is permanent.

In 1837, land, which had gradually accreted to the plaintiff's zemindary on the north side of the river G., which separated two districts, was temporarily assessed at a low rate, the land then being scarcely culturable. In 1837, the value of the land having meanwhile increased, the settlement was renewed at a greater revenue. On the expiration of this settlement in 1857, the land, in consequence of a sudden change in the river G., was found capable of identification on the southern side of the river. There was no evidence of any usage within section 2 of Regulation XI of 1825, that the main channel of the river G. should be taken as the constant boundary, not only between the two districts but also between the zemindaries on each bank divided by the river.

Held (reversing the judgment of the High Court—KEMP and BIRCH, *J.J.*,) that the plaintiff was entitled to the land, and to have a settlement made in respect of it.

APPEAL from a decision passed by a divisional bench (Kemp and BIRCH, *J.J.*) of the High Court at Calcutta.

Doyne, for the Appellants.

Leith, Q.C., Cowie, Q.C., and *C. W. Arathoon,* for the Respondent.

The following judgment was delivered by their Lordships of the Judicial Committee (1) of the Privy Council:—

The facts of this case are very clearly stated in the judgment of their Lordships upon the remand in the year 1873. It is

(1) Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, Sir ROBERT P. COLLIER.

1879

RUGHOOBUR DYAL SAHOO v. KISHEN PERTAB SAHEE.

Judgment.

that in 1837 a settlement of the lands in dispute was made with the predecessors of the plaintiff. That settlement was made at a revenue of Rs. 842-3-0. In 1847, the settlement was renewed, and the predecessors of the plaintiff continued in possession of the lands from 1837, when the settlement was first made with them, down to the expiration of the settlement of 1847. Prior to the renewal of that settlement in 1857, the river Gunduck, which was to the south of the plaintiff's zemindary and to the north of the defendant's, had so completely changed its course that the lands in dispute, which were formerly on the north side of the river, were capable of being identified on the south side of it.

A question arose as to the renewal of the settlement of 1847, and the lands being then on the south side of the river, which was the acknowledged boundary between the districts of Sarun and Tirhoot, were then in the district of Sarun. Mr. Lautour, who was the Collector of Tirhoot, and who had formerly settled the lands when they were on the north side of the river, and were then in his district, had some doubt whether he had jurisdiction to re-settle them. The question was referred to the Commissioner, Mr. Taylor, who decided in favor of Mr. Lautour's jurisdiction, and directed him to renew the settlement with the owners of the plaintiff's zemindary, Sohagpore, upon which an appeal was presented to the Board of Revenue, and they ordered the settlement not to be made with the owners of the plaintiff's zemindary, but with the owners of that of the defendant on the southern side of the river. It is in consequence of that order that differences have arisen between the parties as to whether the plaintiff was entitled to a renewal of the settlement in 1857, or whether the defendant was entitled to it.

The rule, under the 1st clause of the 14th section of Regulation XI of 1825, is that land gained by gradual accession, whether from the recess of a river or of the sea, is to be considered as an increment to the tenure of the person to whose land or estate it is thus annexed, "whether such land or estate be held immediately from Government by a zemindar or other superior landholder, or as a subordinate tenure by any description of under-tenant whatever." The plaintiff claimed

1879

RUGHOOBUR DYAL SAHOO v. KISHEN PERTAB SAHEB.

Judgment.

that the lands in dispute were formerly an increment of his estate by gradual accession, and that they had been settled with the owners of Sohagpore upon that basis. By the 2nd clause of the 14th section the rule before mentioned was not to be considered applicable to cases in which a river, by a sudden change of its course, breaks through and intersects an estate without any gradual encroachment, or by the violence of its stream separates a considerable piece of land from one estate and joins it to another estate without destroying the identity and preventing the recognition of the land so removed. The change of the course of the river Gunduck on the last occasion was a sudden change, and the land which had originally been settled with the plaintiff on the north side of the river was capable of being identified on the south side of the river. Therfore this land which had been in the possession of the plaintiff for twenty years, and had been brought into cultivation by him, did not, according to the 4th section of Regulation XI of 1825, belong to the owner of the zemindary on the south side of the river as having been gained by gradual accession. But a question arose whether in consequence of an established usage the river, however its course might be changed, was not to be considered as the boundary between the two zemindaries, as it was between the two districts. The 2nd section of Regulation XI of 1825 was relied upon by the defendant. But in that section it was enacted that, "whenever any clear and definite usage of shekust pywust respecting the disjunction and junction of land by the encroachment or recess of a river may have been immemorially established for determining the rights of the proprietors of two or more contiguous estates, divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river by encroachment on one side and accession on the other), the usage so established shall govern the decision of claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage." The Sudder Board of Revenue thought that there was a clear and definite usage that under all circumstances, the river should be the boundary between the zemindaries on the one side and those on the other.

1879

RUGHOOBUR DYAL SAHOO v. KISHEN PERTAB SAHEE.

Judgment.

:—"At the time of the permanent settlement, and since then, re has been, the Board observe, a distinct and clear usage that main channel of the Gunduck should be the constant boun- y between the two districts of Sarun and Tirhoot, and between zemindaries on each bank divided by the river." They ac- dingly ordered a settlement to be made with the defendant, in conformity with those directions a summary settlement of lands, which are the subject of this appeal, was made with defendant, the Maharajah of Hutwa, who obtained possession the lands. Thereupon the plaintiff, in January 1860, com- ced this suit. He contended that the lands having been ed as an accretion to his zemindary on the north side of the r were his by virtue of proprietorship; and that being capable dentification, notwithstanding the change of the river, they aged to him under clause 2, section 4 of Regulation XI 825 and not to the defendant; and then the question arose ther there was such a custom as that which the Board of enue stated, namely, a custom that the river should be the ndary, not only of the districts, but of the zemindaries on ot side.

he Principal Sudder Ameen tried the case, and he dismissed plaintiff's suit upon some technical objections, and also upon ground that the decision of the Board of Revenue that the lement should be made with the plaintiff was final and con- ive. Upon appeal to the High Court they reversed that ision, and remanded the case to the Principal Sudder Ameen retrial.

he case afterwards came before this Board upon appeal, and r Lordships in their judgment of remand, alluding to the l of the case by the Principal Sudder Ameen after the remand he High Court, say:—"The opinion thus intimated clearly ies that the principal if not the only questions between the es were whether the change in the course of the river having sudden, and the lands being capable of identification, the case within the second clause; or whether the recession of the r having been gradual, it had taken from the Tirhoot what had once belonged to it and given what it so to the Sarun estate by accretion in the proper sense

1879

RUGHOOBUR DYAL SAHOO v. KISHEN PERTAB SAHEE.

Judgment.

of the term. The High Court seems to have assumed that the plaintiffs may once have had the permanent and proprietary interest in the lands, and altogether to have ignored the existence of the alleged usage as an element in the case. This seems to have misled the Principal Sudder Ameen who tried the cause on remand; for, although in one part of his judgment he treats the temporary settlements with the maliks of Sohagpore, that is, the maliks of the zemindary on the north side of the river, "as having been made with reference to some such usage as that alleged, and therefore to have given them only a limited tenure, he omitted to try the issue whether the usage existed in fact." Their Lordships afterwards went on to say:—"The first settlement certainly purports to have been made with the then maliks of Sohagpore in the character of proprietors of the alluvial land settled; but in their Lordships' opinion it is doubtful whether they were treated as proprietors by reason of the alleged usage, or because the Deara land was supposed to have formed by gradual accession on their estate, and to have become an increment thereto within the meaning of the first or of the latter part of the 3rd clause of section 4 of Regulation XI of 1825. Their Lordships have not before them the whole settlement proceedings; and the Board of Revenue, which presumably had access to them, has stated that the settlements were made in accordance with the supposed usage. The proceedings which are before their Lordships are not altogether inconsistent with this proposition. On the contrary, they contain passages which seem to favor it, though they do not, taken as a whole, support the finding on this point of the Principal Sudder Ameen. From what has been said above, it plainly appears that the material thing to be determined in this case was the existence of the alleged usage, yet the issue upon that point has never been tried." Their Lordships finally remanded the case in order that two new issues should be tried: "first, whether the land in dispute was settled in 1837 with the then maliks of Mouzah Sohagpore as the proprietors of alluvion which had become an increment to their estate by gradual accretion, or upon what other grounds such settlement was made; the burden of proving the affirmative of the first part of this issue to lie on the plaintiffs; secondly,

1879

RUGHOOBUR DYAL SAHOO v. KISHEN PERTAB SAHEE.

Judgment.

whether there was at the date of the permanent settlement, and has since been, a clear and definite usage, that the main channel of the river Gunduck should be the constant boundary, not only between the districts of Sarun and Tirhoot, but also between the zemindaries on each bank divided by the river. The burthen of proving the affirmative of this issue to lie on the defendant."

The case then went down and was retried upon those issues, and further evidence was given on the part of the defendant to show that there was such a usage. The Subordinate Judge, upon the evidence, found that no such usage had been proved; and he also found on the first issue that the settlement in 1837 was not made upon the ground of the alleged usage under section 8, Regulation XI of 1825, but on the ground of their proprietary title under the provisions of clause 1, section 4 of that Regulation, that is to say, that the land was settled in 1837, with the owners of Sohagpore as the proprietors of alluvion which had become an increment to their estate by gradual accretion. An appeal was preferred from that judgment to the High Court, and that Court over-ruled the decision of the lower Court upon the finding on the first issue, and they abstained from coming to any conclusion upon the second issue. There certainly is no sufficient evidence to justify their Lordships in finding that there was such a clear and definite usage as that stated in the second issue, and in overruling the decision of the lower Court upon that issue upon which the High Court have expressed no opinion. Mr. Justice KEMP, one of the learned Judges of the High Court, who decided the case upon appeal, held that the Subordinate Judge was wrong in finding that the lands had been settled with the owners of Sohagpore in 1837, upon the ground of their proprietary title under clause 1, section 4, of the before-mentioned Regulation. At page 237 of his judgment he does not quite accurately state what the issue really was. Speaking of their Lordships' judgment on remand, he says:— "They then remark, that if it should appear that the alleged usage, that is, the usage set up by the defendants, namely, that the river Gunduck is the boundary between the two zillahs of Sarun and Tirhoot, [illegible], and that the settlements were made on the basis of that usage, or (and these observations are very important)

1879

RUGHOOBUR DYAL SAHOO v. KISHEN PERTAB SAHEE.

Judgment.

for any other reason the interest of the maliks of Sohagpore in the land in dispute was of a limited and temporary character, and had expired, that would be fatal to the plaintiff's suit." There was no doubt that the river was the boundary between the two zillahs of Sarun and Tirhoot; but the real question was, whether there was clear and established usage that that river should be the constant boundary between the zemindaries on either side. That was the question as to usage which their Lordships intended to be decided.

On reversing the decision of the lower Court upon the first issue, Mr. Justice KEMP says:—"Then comes the document to be found at page 33, Appendix I., which is a proceeding of the Deputy Collector of Tirhoot, Mr. Edward D'Rozario, dated 28th November 1837. At page 35 he says that:—"Having held a local inquiry and examination I effected a temporary settlement for seven years from 1245 to 1251 Fusli, with Jugdeo Narain, the proprietor of the bureri lands above mentioned; that is, the lands of Sohagpore." That does not affect the case at all. He merely says that he had made a temporary settlement with the owners of Sohagpore. Mr. Justice KEMP proceeds:—"Then follows at page 41 a copy of the report of the same officer, *viz.*, Mr. Edward D'Rozario, the Deputy Collector of Tirhoot, to his immediate superior, Mr. Campbell. Before referring to this report we notice a passage in the settlement proceeding of Mr. D'Rozario, which is to be found at page 39, Appendix I. He says:—'The proprietors of Mouzah Bhukain, &c., Pergunnah Goa, Zillah Surun, were given to understand that a settlement of the land that has accreted from the Gunduck cannot be made contrary to the line of demarcation, namely, the river Gunduck.' Returning to the report of Mr. D'Rozario submitting his proceeding to his immediate superior, we find, at page 42, paragraph 6, of that report that the petition of the maliks of Bhukain, in which they had claimed for an exception to the established usage of the recognised boundary of the main channel of the Gunduck to be made in their favor, was opposed to all regulation and was inadmissible." Those two documents are set out in the present record, first at page 44 in which Mr. D'Rozario says, "therefore the proprietors of Mouzah Bhukain,

&c., Pergunnah Goa, Zillah Sarun, were given to understand that a settlement of the land that has accreted from the Gunduck cannot be made contrary to the line of demarcation, namely, the river Gunduck." He does not say that a clear and definite usage existed that the river Gunduck was to be the boundary between the two zemindaries. The other document to which the learned Judge refers is at page 47 of the record, and is contained in a letter to Mr. Campbell, who was the Deputy Collector in charge of khas and resumed mehals in Tirhoot. That letter was dated the 16th February 1838, and contains the passage to which the learned Judge refers. "The petition of the Maliks of Bhukain, &c., Zillah Sarun, for exception to the established boundary of the main channel of the Gunduck in opposition to all regulation was inadmissible, and their unfounded officiousness pointing out the permanently assessed land as portion of the alluvion from a puerile motive." To say the least of it, it is very ambiguous what was meant by that statement. But in the last paragraph of that letter, at page 48 of this record, paragraph 9, he says:—"These lands established as an alluvion of the estate registered in the name of Futteh Singh, descending on his demise to his sons Gunga Pershaud and Jugdeo Narain Singh, with the latter as the surviving proprietor. I have, under Regulation XI of 1825, effected a temporary settlement for seven years from 1245 to 1251 Fusli, inclusive on the suddur jummah of Sicca Rs. 789-9-0, or Co.'s Rs. 842-3-2, which I now have the honor to submit to your approval." If Mr. D'Rozario had relied upon a clear and established usage that the river was, under all circumstances, to be the boundary between the two zemindaries, it was unnecessary to say that it had been established that the lands were an alluvion of the estate, &c. It would have been sufficient to say they are to the north of the river, and consequently, according to the established usage, are part of the zemindary on the northern side of it. It appears, therefore, to their Lordships that the lands were settled with the predecessors of the plaintiff as an alluvion of their estate, and that as far as the statements in the letter go, they do not establish that it was made with the plaintiff upon the ground of there being an ancient and established usage that under all circums-

1879

RUGHOOBUR DYAL SAHOO v. KISHEN PERTAB SAHEE.

Judgment.

tances the river Gunduck should be treated as the boundary between the two zemindaries. Having referred to those documents, Mr. Justice KEMP proceeds to say that the settlements were merely temporary. He says:—"These are all the proceedings of any importance with reference to the first temporary settlement made with the plaintiff by the revenue authorities. The second settlement was made for ten years with the plaintiff, from 1846 to 1856 by the Deputy Collector. At page 45 will be found the proceeding of that officer with reference to this second temporary settlement made with the plaintiff. That proceeding was before their Lordships of the Privy Council." It does not appear that the second settlement at all affected the case: it was merely a renewal of the settlement of 1837, and if the settlement of 1837 had been made on the principle of established usage, the second settlement followed upon the ground of that usage. If, on the contrary, it was made with the plaintiff as the proprietor of an estate to which the lands had become an accretion by gradual accession, then the second settlement was made upon the same principle. Mr. Justice KEMP proceeds:—"The next proceeding is at page 55. This was not before the Privy Council, but was subsequently filed after the remand by the plaintiffs. It is merely a letter of the Collector forwarding the proceedings connected with the temporary settlement concluded with the plaintiff. But a passage has been referred to in it by the pleader for the plaintiff, in which the Collector says that a settlement has been concluded for a period of ten years with the heirs of Gunga Persad and Jugdeo Narain as maliks of the Kurrari Mehal." That shows that the settlement was made with them, not in consequence of any known and established usage, but upon the ground of the ordinary rule under Regulation XI of 1825. Then he says:—"Having reviewed the documents filed by the plaintiff both before and after remand, we came to the decision upon the first issue laid down by their Lordships of the Privy Council; and as after a careful consideration we have come to a conclusion different to that which the Subordinate Judge has arrived at, we shall confine our decision to the finding on the first issue laid down, inasmuch as we consider it unnecessary to

enter into the second issue laid down by their Lordships of the Privy Council. We are of opinion that the settlements made with the plaintiffs were temporary settlements, and were made on the basis that the Gunduck was the boundary line, not only of the two zillahs, Sarun and Tirhoot, but of the estates appertaining to those districts; that the land in dispute was settled with the plaintiffs on temporary leases; and that those settlements were of a limited and temporary character. Such being the case, to use the words of their Lordships, this finding is fatal to the plaintiffs' suit."

With reference to the settlements being of a temporary character, we must consider what the law is upon the subject. If this accretion belonged to the plaintiff by virtue of the 1st clause of section 4 of Regulation XI of 1825 as lands which had been gained by gradual accession to their estate, then by the virtue of the 1st clause of that section it became an increment to the plaintiff's estate, and the property became his property. The words are: "When land is gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landowner, or as a subordinate tenure of any description of under-tenant whatever; provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation XI of 1819, or of any other Regulation in force." Assuming it to be a case within this section, the land became the property of the predecessors of the plaintiff liable to be assessed by the Government for revenue; but there was no obligation on the part of the Government to assess it permanently, nor would it have been proper to do so, because at the time when it was first annexed it was mere sandy soil scarcely cultur-

1873

RUGHOOBUR DYAL SAHOO v. KISHEN PERTAB SAHEE.

Judgment.

able, and was so reported by Mr. D'Rozario. In his report at page 45, he says :—"At first he"—that is, Jugdeo Narain Singh, the plaintiff's predecessor—"raised a number of pleas as to his inability to pay the rent,"—that is, the revenue, "and that the Deara will not remain in existence, owing to the force of the river Gunduck. Upon this, he was made to understand that the whole of the land is somewhat like a sandy desert, and, of course, after the lapse of some time it will become culturable, and yield a great profit." Then he assented to take it at the revenue, which the Government fixed at the time, of Co's. Rs. 842, and began to cultivate it; but the Government only assessed temporarily that which was his permanent property. A temporary assessment did not reduce to a temporary estate, or to an estate of a limited and temporary character, the interest of the plaintiff in the accretion, which was permament, as being an increment to an estate which was permanent, but it merely fixed the period during which the increment should be subject to the revenue of Rs. 832, so that the Government at the expiration of the settlement might be at liberty to raise it according to the value of the land. At the expiration of the settlement of 1837 they renewed the settlement at a revenue of Rs. 1,500. The land had then become improved. The plaintiff remained in possession of the land under temporary settlements from the year 1837, for a period of nearly twenty years, down to the year 1857, and during the whole of that time he paid revenue to Government, partly during the time when the land was little better than a sandy desert. The plaintiff and his predecessors cultivated the lands, and so improved it that in 1847 it was assessed at Rs. 1,500. The plaintiff was during twenty years in occupation of the land, when at the expiration of the settlement of 1847, in consequence of a sudden turn of the river Gunduck, it was on the southern side of the river capable of being identified, and still belonged to the plaintiff, unless there was a clear and definite usage that the river Gunduck was to be the boundary, not only between the two districts, but between the zemindaries on either side.

Such a custom has not been proved ever to have existed. The Subordinate Judge has found that there was no such usage. The

1879

RUGHOOBUR DYAL SAHOO v. KISHEN PERTAB SAHEE.

Judgment.

;h Court has not considered the evidence or reversed the ling of the Subordinate Judge upon the second issue, and ir Lordships are of opinion that the established usage was not de out. The usage not having been proved, their Lordships of opinion that there was no sufficient evidence to justify finding of the High Court that the revenue settlements were le on the basis that the river Gunduck was the boundary : not only of the two zillahs, Sarun and Tirhoot, but of the ıtes appertaining to those districts; on the contrary, they are opinion, that the settlements, though temporary, were made h the predecessors of the plaintiff as an alluvion to the estate Sohagpore which, in 1837, was registered in the name of tteh Singh, and upon the ground that the predecessors of the intiff were the maliks and proprietors of the estate, and sequently that the finding of the lower Court upon the first ıe, under the remand from this Board, was a correct finding, l that the reversal of that finding by the High Court was oneous.

They will, therefore, humbly advise Her Majesty that the decree he High Court be reversed; that it be declared that the plain- s are entitled to the lands in dispute, and to have a settlement de with them; and that it be ordered that the plaintiffs do over possession of the said lands, with mesne profits, from the e of the institution of the suit, such mesne profits to be ssed in execution of the decree; and that the respondent do the plaintiff the costs in all the lower Courts and the costs he former appeal to Her Majesty in Council as already taxed part of the costs in the cause; and their Lordships order that respondent do pay the costs of this appeal.

[PRIVY COUNCIL.]

1879
June 27th.

DWARKA DASS AND OTHERS . . . . . APPELLANTS;

AND

RAI SITA RAM . . . . . RESPONDENT.

Execution of Decree—Insolvency—Decree, Right of purchaser under, t recover property deposited with creditors.

A member of a firm of Native Bankers which had become insolvent with a view to protect his property from the general body of his credi tors, in March 1870, deposited property to the value of Rs. 30,00 with the appellants, another firm of Bankers, to whom he owe Rs. 1,500.

In April 1871, the appellants brought an action against him for R 500, the balance of that debt, and obtained a decree, in execution o which the property was put up for sale and purchased by the respon dent. *Held* (affirming the decision of the High Court of the N.-W Provinces), that the respondent was entitled to the property.

APPEAL from a decision of the High Court of Judicature a Allahabad.

Doyne for the Appellants.

No one appeared for the Respondent.

The facts are set forth in the judgment of the Judicial Com mittee (1) of the Privy Council, which was as follows :—

This was an action brought by the respondent against the appel lants, a firm of bankers at Jounpore, to recover a quantity of gold said to consist of 1,000 gold mohurs, 500 guineas, and five ingo of gold, which are alleged to have been deposited with them b one Luchman Dass, or the value of the gold. The plaintiff clai as the purchaser of the right of Luchman Dass in the deposit u der an auction sale held in pursuance of execution proceedi upon a decree which he had obtained against Luchman Dass. T claim is founded upon the following case :—Luchman Dass w one of a firm of native bankers carrying on business at Gazeep and Jounpore, certainly at Gazeepore, and apparently al Jounpore where he lived. The firm had got into difficulties, in February 1870, had become bankrupt. In what particular

(1) Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MOR SMITH, and Sir ROBERT P. COLLIER.

it had become so is not stated, but there seems to be no doubt, and ome evidence is to be found in the record of the fact, that Luchman's firm was largely indebted at that time. The case alleged is hat Luchman Dass, with a view to protect the property from his reditors, on the 15th March 1870, deposited the gold in question ith the appellants. Evidence was given to the effect that the old had been kept at Gazeepore, and was brought on the 15th arch 1870, or the day before, to Jounpore, and placed in the ouse of Luchman Dass, and that it was taken on the following orning to the appellants and deposited with them. It is said that *surkut* or receipt was given for the gold, which was signed by ne of the appellants, Luchmee Narain. The *surkut* is set out in e record, and is in these terms:—"Receipt *surkut* granted to aboo Luchman Dass, Khettree, resident of Mahra Tollah.

Cr. *Dr.*

Dated Phagoon Soodee, 13th Sumbut, 1826, 1,000 gold mohurs, 00 guineas, 5 gold ingots weighing 500 tolahs.

Firm of Madun Gopal, Ram Charun," (which appears to be the ppellants' firm,) and it is signed "Luchmee Narain."

The next fact which appears in the evidence is, that about the th June 1870, Luchman Dass made a demand upon the appellants r the gold, or the value of it. At that time the appellants did ot deny the deposit, but said that when the settlement with the editors took place—and it had been suggested that a settlement ith the creditors was the reason for the demand—they would de- er it back. It is stated that after that demand, on the 30th ne 1870, Luchman Dass deposited a pearl necklace with the ppellants for sale. On the following day he demanded the neck- e or the price of it, and the appellants denied having received

On the following day, the 2nd July, a demand was again made the part of Luchman Dass for the gold, and on that occasion appellants repudiated the transaction and denied all knowledge it. Luchman Dass proceeded criminally against the appellants fraudulently withholding the necklace, under section 409 of Criminal Code, and it appears that the case was heard before Magistrate of the district, who convicted two of the appellants sentenced them to two years' imprisonment. There was an eal from the Magistrate's decision to the Judge, who affirmed

1879

DWARKA DASS v. RAI SITA RAM.

Judgment.

it; and a subsequent appeal to the High Court, upon the question of law, who also affirmed the decision. Their Lordships mention these proceedings as a part of the history of the case, but they have not allowed the fact that the appellants were convicted to influence their judgment in the present case. It is, however, impossible not to notice the fact, because the story of the necklace was more or less connected with that of the deposit in question in this suit, and the learned Counsel for the appellants drew an inference adverse to the respondent's case from that prosecution, suggesting that it was probably done to influence the minds of those who had to decide the question as to the gold adversely to the appellants.

With regard to the deposit of the gold, the first proceeding was taken by Luchman Dass himself. On the 15th July 1870 he filed a petition praying to be allowed to sue the appellants for the gold *in formâ pauperis*. In his plaint he does not mention the *surkat*, but in his deposition, made three days after the filing of the petition, he refers to the *surkat*, and he refers to it as having been made on plain paper. The petition to sue *in formâ pauperis* was ultimately dismissed, the Judge having come to the conclusion that Luchman Dass had not established to his satisfaction that he was entitled to sue as a pauper.

The next step in the case was the purchase by the respondent of Luchman Dass's interest in the gold, at the auction sale already referred to. The date of his purchase was the 6th April 1871. The proceedings in the suit which led to the decree under which that purchase was made are not in the record; but it has been admitted by the learned Counsel for the appellants that there is no evidence whatever on the record to show that that suit was other than a hostile suit, or that there was any collusion in it between the respondent and Luchman Dass. Nor is there any evidence whatever in the case that the present action of the respondent as such purchaser is brought in collusion with Luchman Dass. Indeed there are some indications in the proceedings that Luchman Dass was reluctant to assist the plaintiff in the prosecution of this suit.

It may be observed that Luchman Dass was indebted to the appellants at the time of the deposit in a sum of Rs. 1,500, and

n the 17th April 1871 the appellants brought an action against im and his partners for Rs. 500, the balance of that debt, and btained judgment against him. It has been said that it was n improbable circumstance that Luchman Dass should have eposited this gold with the appellants who were admitted credi- ors of his at the time of the deposit. That circumstance scarce- y creates an improbability. Upon the hypothesis Luchman)ass was about to put away property of the value of Rs. 30,000 n order to keep it from the general body of his creditors. Unless he had kept it in his own possession he must have placed it with bankers or some other persons for safe custody. It ap- pears that two of the partners of the appellant's firm were his relatives; they had had business transactions together; and if such a scheme was to be carried into effect, there seems to be no improbability, on the contrary some probability, that the defend- ant's firm would have been selected for that purpose. The small debt due from Luchman Dass to them was not likely to be an obstacle to his selecting them for the deposit.

The present action was brought in July 1873. The witness ex- amined on the part of the plaintiff to prove the case were agents and servants of Luchman Dass or of his firm, and they prove, in distinct terms and circumstantially, that this gold was brought from Ghazeepore, deposited in the house of Luchman Dass at Jounpore, and taken to the appellants, and that the receipt was obtained in the manner which has been mentioned. Upon an examination of their evidence there are some inconsistencies and contradictions to be found in it. Those inconsistencies and con- tradictions have raised considerable doubt in the minds of their Lordships as to the truth of the case represented by the wit- nesses, which would have led them to give further consideration to it than they have already done if there had not been corrobor- ation of their evidence in the *surkut* which is alleged to have been given by Luchmee Narain, and they think that this case, at the point at which it has now arrived, must be determined prin- cipally by the view which ought to be taken of that *surkut*. If the *surkut* is genuine, and was really given, there can be little room left for doubt. It would corroborate in the strongest way the parol evidence.

1879

RUGHOOBUR DYAL SAHOO v. KISHEN PERTAB SAHEE.

Judgment.

of the term. The High Court seems to have assumed that the plaintiffs may once have had the permanent and proprietary interest in the lands, and altogether to have ignored the existence of the alleged usage as an element in the case. This seems to have misled the Principal Sudder Ameen who tried the cause on remand; for, although in one part of his judgment he treats the temporary settlements with the maliks of Sohagpore, that is, the maliks of the zemindary on the north side of the river, "as having been made with reference to some such usage as that alleged, and therefore to have given them only a limited tenure, he omitted to try the issue whether the usage existed in fact." Their Lordships afterwards went on to say:— "The first settlement certainly purports to have been made with the then maliks of Sohagpore in the character of proprietors of the alluvial land settled; but in their Lordships' opinion it is doubtful whether they were treated as proprietors by reason of the alleged usage, or because the Deara land was supposed to have formed by gradual accession on their estate, and to have become an increment thereto within the meaning of the first or of the latter part of the 3rd clause of section 4 of Regulation XI of 1825. Their Lordships have not before them the whole settlement proceedings; and the Board of Revenue, which presumably had access to them, has stated that the settlements were made in accordance with the supposed usage. The proceedings which are before their Lordships are not altogether inconsistent with this proposition. On the contrary, they contain passages which seem to favor it, though they do not, taken as a whole, support the finding on this point of the Principal Sudder Ameen. From what has been said above, it plainly appears that the material thing to be determined in this case was the existence of the alleged usage, yet the issue upon that point has never been tried." Their Lordships finally remanded the case in order that two new issues should be tried: "first, whether the land in dispute was settled in 1837 with the then maliks of Mouzah Sohagpore as the proprietors of alluvion which had become an increment to their estate by gradual accretion, or upon what other grounds such settlement was made; the burden of proving the affirmative of the first part of this issue to lie on the plaintiffs; secondly,

of the document which is impeached than those who heard the evidence and saw and watched all that took place. The High Court, having made the inquiry, delivered a judgment marked by extreme care, and the result of their examination of the evidence is stated at page 113 of the Record. After giving an analysis of the evidence, interspersed with their observations upon it, they said:—"These considerations lead us to the conclusion that on the parol evidence alone the appellant established a *primâ facie* case which the respondents were bound to have answered. It makes in favor of the credit due to the witnesses, Hushmut Ali and Surju Pershad, Ram Doss and Ramsurrun Loll, that they all mentioned other persons who were present and the occurrences to which they respectively speak, whom the respondents might have called to contradict them had they been so minded. Luchmee Narain contended himself with a simple denial of the deposit and of the execution of the *surkut*. Sheodurshun, who is said to have been present when the deposit was made, and when its return was demanded and refused, was not examined." Then they say:—"Beharee and Madho were mentioned as having been present at the deposit, Hurruck Narain and Beharee at the second demand, and Nurthra Mahraj when the demand was made by Ram Doss to the Collectorate; yet the respondent called none of these persons to contradict the evidence of the appellant's witnesses." It seems that the High Court were accurate in saying that the respondent called none of those persons; but the appellant had called three of them, and it appeared that they could give no information. They go on:—"We are not, therefore, prepared to say that even on the parol evidence, apart from the *surkut*, the appellant would not be entitled to a decree."

It is unnecessary for their Lordships to say whether or not they would have agreed with that conclusion of the High Court upon the parol evidence if the *surkut* had not existed. The *surkut* having been found by the High Court to be a genuine instrument, it is not necessary for them to say what would have been the effect of the parol evidence upon their minds if it had existed alone. They cannot however but think that the High Court was right in giving considerable weight to the omission on

1879

DWARKA DASS v. RAI SITA RAM.

Judgment.

the part of the appellants to call witnesses whom they might have called. It is inconceivable that if Sheodurshun was able to contradict the fact of the deposit, he should not have been called to do so. He is said by the appellant's witnesses to have been present at the time of the deposit. He is not only one of the defendants, but it appears from the proceedings that he was attending to the defence in Court; yet he did not tender himself to be examined as a witness to contradict the fact of the deposit which was proved by the plaintiff's witnesses to have taken place in his presence. It may also be observed that Luchmee Narain is examined in the most general way. He simply denies the fact of the deposit and of his having given the receipt; he is not examined circumstantially as to the relations of his firm with Luchman Dass, the position in which Luchman Dass was, though he must have known of these things, nor even as to the demands which were said to have been made for the gold, and no other witness from the bank or from any other quarter is called to show that there was no truth in the plaintiff's case. It certainly seems to their Lordships that there was a *primâ facie* case made by the plaintiffs, and that it has not been so fully answered as it might have been, if it were untrue, by the appellants.

Then the High Court, having gone into the inquiry as to the handwriting, came distinctly to the conclusion that the *surkut* was in the handwriting of Luchmee Narain, and they state their conclusion in these terms :—"To us Beni Pershad appears to be by far the most reliable and capable witness called to speak to the handwriting,"—that is, the most reliable and capable on either side,—"and having ourselves compared *surkut* A with other documents admittedly written or signed by Luchmee Narain, we have no hesitation in accepting Beni Pershad's statement that *surkut* A is in the handwriting of Luchmee Narain."

Their Lordships have already pointed out the extreme difficulty in which they are placed by being invited to say, without having seen the documents or the witnesses, that this conclusion is wrong. They think, adverting to the considerations already alluded to, that it is not possible for them to say, in the circumstances of this case, that upon this point the High Court is wrong; and that being so, they are unable to come to the conclusion that

the case of the respondent is untrue. It is a case proved in its circumstances by witnesses, supported by a written document found by the High Court, who heard the witnesses, to be a genuine document, and insufficiently answered on points where, if untrue, it might have been refuted by better and stronger evidence than that adduced by the appellants.

There are no doubt points of difficulty in the way of the respondent's case which have been ably commented upon by the learned Counsel for the appellants. One circumstance is, that Luchman Dass, in his deposition in the pauper suit, speaks of the receipt as having been given on plain paper. Undoubtedly, although originally so given, according to the evidence, a stamp had been afterwards affixed to it. But although this description is a circumstance adverse to the plaintiff's case, it is only one to be weighed with the others, and it is possible that Luchman Dass was thinking of the receipt as it was originally given. It had not been in his possession for some time. Here again the appellants have chosen to leave the case without contradictory evidence. The witnesses on the part of the plaintiff state circumstantially that they went to the appellant's bank, and that the stamp was affixed, and Luchmee wrote lines upon it. Luchmee is not asked a question upon it, and the plaintiffs' case upon this fact stands unanswered.

Another circumstance which was strongly relied upon by the learned Counsel was, that there was no evidence to show how this gold had come into the possession of Luchman Dass, or how long he had it. The witnesses for the plaintiffs say it was at Ghazeepore, which would have been a place where it would naturally have been kept if Luchman Dass had really possessed it; and there was no cross-examination upon the point so as to put the respondent upon further proof than he had given. It is obvious that if Luchman Dass had contemplated the scheme of secreting a part of his property in order to preserve it for himself and to defraud his creditors of it, this gold would have been collected from time to time, and would probably not have found its way into his books.

Then observations were made upon the fact that the defendant's books contained no entry of the transaction. Assuming

1879

DWARKA DASS v. RAI SITA RAM.

Judgment.

the transaction to be at which it is supposed throughout to be, it is not likely that entries would have been found in the regular books of the appellants regarding it; and, although a discrepancy has been attempted to be fastened upon the evidence of the witnesses—some of them stating that there was an entry in a book, whereas no such entry has been found,—that may be explained by the circumstance that the entry is said to have been made in a small hand-book which would not be one of the regular books of the firm.

Their Lordships have given full consideration to all these circumstances. Indeed they have considered the case with some anxiety, feeling that there were circumstances in it which should induce a Court to hesitate before coming to a decision upon it; and having done so, they have come to the conclusion, for the reasons above stated, that they are unable to reverse the decision of the High Court.

They will, therefore, humbly advise Her Majesty to affirm it and to dismiss this appeal.

[PRIVY COUNCIL.]

VADREVU RANGANAYAKAMMA 1879
AND 5th July.
VADREVU BULLI RAMAIYA . . . . . .

Construction of Sunnud—Impartible Zemindary—Partition—Succession by widow.

The owner of an impartible zemindary, which, though forming part of the family property, had, by ancient custom, been held and enjoyed by the eldest male member in the direct line, died leaving four sons and an infant grandson, A, by his eldest son, who had predeceased him. During the minority of that grandson the four surviving sons executed a sunnud which, after reciting certain arrangements made by their father, directed that "the zemindary should be held by A, the son of the eldest son * * * A and we four also shall take in equal shares the inam lands; * * until A attains his proper age, we all should jointly manage the affairs of the said zemindary. * * * After A attains his proper age the zemindary of the inam lands allotted to him should be delivered over to him and each should confine himself to the share allotted to him." Certain jewellery was also divided in similar manner. A died leaving a son C who died in 1865 without issue, but leaving a widow. *Held* (reversing the decision of the High Court of Madras) that the sunnud amounted to an agreement by which the joint family was divided, and, that on the death of C his widow was entitled to the zemindary.

Periasami vs. *Periasami*, L. R. 5 I. A., 61, cited.

APPEAL from a decision of a divisional Bench of the High Court of Madras.

Leith, Q.C., and *Mayne*, for the Appellant.

Doyne and *E. B. Michell*, for the Respondent.

The facts are fully set forth in the judgment of their Lordships of the Judicial Committee (1) of the Privy Council, which was as follows:—

This is an appeal from a decree of the High Court in a suit which the respondent was the plaintiff, and which he instituted against the appellant, for the recovery of the zemindary Vegayanimapet in the district of Coconada. It is not disputed the zemindary, according to an ancient custom, was impartible and that though it was part of the family property, it had for many years prior to, and including the time of Somappa,

(1) Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

1879

VADREVU RANGANAYA-KAMMA v. VADREVU BULLI RAMAIYA.

Judgment.

whom it will be convenient to call Somappa the fi held and enjoyed by the eldest male membe direct line. Somappa the first had five sons, Sundara may in like manner be called Sundarappa the first, Jogiraju, Bhunasunkarudu, and Narasimulu. Sunda first, the eldest son, died in the lifetime of his father, son, Somappa the second, who was at the time of hi death about three months old. He came of age abou 1826. Somappa the second died leaving a son, Sunda second, who died without issue on the 18th Decem leaving a widow who was the defendant in the suit. T be no doubt that if the family had continued joint, zemindary had continued to be part of the joint fami the widow could not have inherited from her husband; bu tended that a partition took place, that the family becam and that the zemindary was allotted to Somappa the his separate share of the joint family property. If tha according to the decision in the case of *Periasami* vs. L. R. I. A., p. 61, the estate upon the death of Sund second descended to the defendant, his widow. It is sai partition was effected by a sunnud or samakhia w entered into on the 29th June 1809. It was at one tended that this document was not a genuine document Subordinate Judge found that it was genuine, and Court acted upon it as a genuine document.

Their Lordships see no reason, after the finding of Courts that this was a genuine document, to distrust th or to hold that it was not genuine. It must, therefore, as a genuine document executed by the four brothers rappa the first who were the surviving son of the first It was not an arrangement which was therefore the come to, but an arrangement which had been come to in conjunction with their father the first Somappa, w time constituted the head of the family. The obj sunnud is thus recited in it: "In order to prevent arising among us in future, in respect of our ancestra namely," then specifying the zemindary in questi joint property of the family, the sunnud proceed

Somappa made certain arrangements with us four brothers, and Somappa the elder brother's son. This we have thought it proper to reduce to writing as follows:—"As the Vegayanimapet Mutta zemindary," that is the zemindary in dispute, "should be held by Somappa, son of the eldest Sundarappa, Umapati," that is, the second brother, "should take care of the said zemindary until Somappa attains proper age, and deliver the same to him on his attaining his age of discretion. Besides, Somappa should enjoy the inam lands in the village of Rajavaram." It was contended that this arrangement was not that Somappa the second should take the zemindary as his separate share upon a partition, but that it was still to remain the joint family property, to be held and enjoyed according to the ancient custom. But it appears to their Lordships that it was the intention to effect a partition, and that Somappa the second should take the zemindary and the inam lands as his share of the joint family property, in accordance with the arrangement made with his grand father, the first Somappa. Somappa the second was a child fifteen months old at that time. The document then proceeds to specify certain other portions of the joint family property which were to be held and enjoyed by each of the four brothers respectively. It then proceeds: "Somappa and we four also should take in equal share inam lands, gardens, &c., standing in Umapti's name in the villages attached to Vegayanimapet Mutta." It was contended at one time that the object of this was that the sons should take certain portion of the joint family property, not as a separate estate upon partition, but in lieu of maintenance, which would otherwise have been allowed by the member of the family who took the zemindary under the custom. But it is evident that that could not be so, because each of the four brothers was agreeing with the others that each should hold the estates allotted to them respectively. Besides, the last clause, "Somappa and we four should take in equal shares the inam lands," shows that the document was not providing for maintenance, for Somappa the second would not provide maintenance for himself by dividing the inam lands in equal shares with his uncles. That clause also tends to show that the document was intended to carry into effect a partition which

1879

VADREVU RANGANAYAKAMMA v. VADREVU BULLI RAMAIYA.

Judgment.

had been made with the consent of the father. Then it goes on, "Until Somappa attains his proper age, we all should jointly manage the affairs of the said Mutta." That is a little inconsistent with the previous clause, which says that, until Somappa should attain his age of discretion, Umapati should take care of and manage the zemindary. The inconsistency does not seem to be very important, but the words undoubtedly are, "Until Somappa attains his proper age, we all should jointly manage the affairs of the said Mutta, discharge the debt of about Rs. 20,000, due up to date, and perform Somappa's marriage and Upnayanam, and the auspicious ceremonies relating to us four. After Somappa attains his proper age, the Vegayanimapet Mutta zemindary and the inam lands allotted to him should be delivered over to him, and each should confine himself to the share allotted him." Now it may be doubtful whether the words "allotted to him" refer to the inam lands only or also to the zemindary. There is nothing to show that they did not apply to the zemindary. The words are: "After Somappa attains his proper age, the zemindary and inam lands allotted to him should be delivered over to him, and each should confine himself to the share allotted to him," thereby treating the allotment to Somappa the second in the same manner as the other portions of the joint family estate had been allotted to the other four brothers respectively. Then having partitioned the lands, they next proceed to partition the jewels. That is inconsistent with the supposition that the document was intended merely to provide allotments in lieu of maintenance. The document proceeds thus: "Each should take to himself the jewels and silver articles in his possession. Sundarappa's jewels and silver articles, &c., as per list prepared by Umapati on Wednesday, the 29th June 1808, should be in Umapati's possession until Somappa attains his proper age, and should thereafter be delivered to Somappa," the word "should" being used instead of "shall."

It was intended that when Somappa the second should attain his full age the zemindary was to be held by him. He was also to enjoy the inam lands which were allotted to him, and they were to be delivered over to him, together with the jewels which, according to the terms of the agreement, were to be his separate

property. "The above terms should be acted up to." "Except under these stipulations, no claim whatever can be urged by one against another in any manner. To this effect is this samakia sunnud (deed of arrangements) entered into by us four of our own accord."

It is said that Somappa the second did not ratify this agreement, but the grandfather was the person who made the arrangement with his four surviving sons, and in fact it was ratified by Sundarappa the second, who set it up, and claimed the benefit of it in the answer which he put in a suit instituted against him by the widow of one of the members of the family for maintenance, and which will be afterwards referred to. Furthermore, if the document did not effect a partition, Somappa the second, the grandson, and Sundarappa the second, his son, were enittled to a share in the other portions of the joint family property. But they have never had it. The other brothers and their descendants have retained the property which was allotted to them. The sunnud was executed by the four brothers, they have acted under it, and had the benefit of it. Sundarappa the second set it up in his defence in the suit as a document binding on all the parties. So far then as assent is concerned, their Lordships are of opinion that the document was assented to by Sundarappa the second, who was then representing his father's share in the estate which had descended to him after the death of his father.

The Subordinate Judge held that by means of this document a partition was effected of the joint estate, and that the zemindary fell to the share of Somappa the second. The High Court held, upon appeal, that the parties had no intention of relinquishing their rights in the zemindary, or to make it separate property. One of the issues raised in the suit was, whether the family is divided. The Subordinate Judge entered into a very careful and minute consideration of all the evidence which had been adduced on that issue, and he also examined all the subsequent acts and conduct of the parties; having heard the witnesses of the plaintiff who were called to prove that the family continued joint and was never divided, he disbelieved them, and came to the conclusion that the family was a divided family. Unfortunately the High Court has expressed no opinion upon that point, nor did

1879

VADREVU RANGANAYA-KAMMA v. VADREVU BULLI RAMAIYA.

Judgment.

they allude to the several acts of the parties upon w Subordinate Judge relied in support of his view that th was divided, and that it was the intention of the parties the zemindary to Somappa the second as his separate the joint family estate. No members of the family we by the plaintiff, but members of the family were calle defendant, and the learned Judge believed them. Acc the terms of the sunnud, Umapati or the four brothers- ters not which—were to manage the zemindary until should attain his full age. He did attain his full age This must now be treated as a genuine document, and ought, when Somappa the second arrived at age, accordin terms of the agreement, to have handed him over the est from the debt of Rs. 20,000, which were to be discharge the profits of the estate during the minority. He ough have handed him over the jewels: but either he or brothers remained in possession during the whole of the second's minority, and when he arrived at age, Uma not deliver over the estate. In 1833 Somappa the sec obliged to bring an action against Umapati to recover i probable that Somappa the second at that time did not the sunnud. It is not likely that when Umapati was frau keeping the estate, which by the very terms of the deed to hand over to him, he would inform him of the sunnud showed that he was to hand over the estate to him on his ing proper age. The probability is that Umapati, wh dishonest as to retain this young man's estate after he age, did not show him or inform him of the deed. Som second commenced his suit in 1833, and he then relied u family custom, by which the zemindary was to be held and by the eldest male member of the family in the direct succession. He said: "My grandfather sent a petitio and signed by him and attested by witnesses, under 29th September 1794, in which it is clearly stated that a to the custom obtaining from generation to generation family, the eldest line inherits the zemindary; that the o bers of the family receive maintenance; that this for the seven generations past; that after his death h

and my father Sundarappa should, according to the custom, succeed to the zemindary." It is said that that is a strong argument against him with reference to the construction of the sunnud, that he claimed not by virtue of the sunnud, but by virtue of succession, according to the custom. The suit was defended, and the defendant in his answer stated: "The custom of the family has been for the eldest surviving son to succeed to the zemindary, and for the other members of the family to receive an allowance; that defendant's grandfather had six sons. The eldest was Venkata Jogi. He died before his father, and the second son, Somappa, defendant's father, succeeded on his father's death, and paid an allowance to Venkata Jogi's son as long as he lived; that defendnat, being the eldest surviving son at the time of his father's death, he succeeded, and his father executed a sunnud appointing defendant his successor, and fixed an allowance of 70 pagodas a year to be paid to his other sons." So that he set up that according to the custom the estate had descended to him, knowing that he had executed a document in which he had admitted that the estate was to go to Somappa the second, and that he was to hold the estate for him during his minority and hand it over to him upon his coming of age. After retaining the estate for five years, and more, after the young man had become of age, he set up the defence that it never was his, and that it descended to him, Umapati, himself. The Provincial Court of Appeal decided that the plaintiff, Somappa the second, was entitled to the estate according to the family custom. The decree was as follows:—

"The acting first Judge, on the above grounds, decrees that the plaintiff is the legal heir of his grandfather; that the zemindary of Vegayanimapet should be placed in his possession when the attachment by the Collector is removed," and then he awarded to the plaintiff damages Rs. 6,208, the net produce of the zemindary during the five years that Umapati had improperly retained in his possession. Their Lordships are of opinion that the young man, Somappa the second, at the time when he commenced the suit, had been kept by Umapati in ignorance of the sunnud which afterwards came to his knowledge, and there is nothing to show that he knew of the sunnud when he presented the

1879

VADREVU RANGANAYAKAMMA v. VADREVU BULLI RAMAIYA.

Judgment.

petition of the 4th September 1845, at page 27 of the record, in which he relied upon the family custom.

In 1864, Suramma, the widow of Mritianjayudu, a son of Bhimasankaradu, the third brother, sued Sundarappa the second for maintenance (page 63 of the record), and the defendant in the suit set up the sunnud as a defence (pages 30-31). In his answer he said: "During the minority of my father Somappa, son of Sundarappa, who was the eldest of the five sons of my great grandfather Somappa, a samakia sunnud or deed of arrangement was entered into, and on the strength thereof my zemindary passed to my father for his share under the revised decree passed in suit No. 47 of 1834 on the file of the late Provincial Court." This is the defence by which, as has already been observed, Sundarappa the second ratified the sunnud. He set up the sunnud, and stated—not quite accurately, certainly that the father had recovered the zemindary on the strength of it. The father had not recovered the zemindary on the strength of it, although he had recovered the estate. At page 63 of the record there is the judgment of the District Moonsiff's Court, in which the District Moonsiff says:—"It appears clearly from the evidence for the defendant and from the samakia (deed of arrangement) that the Pasupalli Mokhassa and the lands in Sarpavaram, and other villages, came to the share of the plaintiff's father-in-law. As the plaintiff has failed *in toto* to prove the first and third points, *i.e.*, as to division"—(it means as to there having been no division of the estate)—"and as to the possession of property, it is not necessary to record with reference to them any reasons other than those given above." That decision was afterwards upheld on appeal by the Court of the Principal Sudder Ameen, who held that the widow was not entitled to maintenance, upon, amongst other grounds, that her husband had admitted that the families were divided.

Another document relied upon by the Subordinate Judge was one which showed that Sundarappa the second had mortgaged the zemindary, from which the Judge inferred that he had treated it as his separate and distinct property, and not a portion of the joint property which he was holding separately by virtue of the custom. Their Lordships are of opinion that no great importance

can be attached to the mortgage, because even if Sundarappa the second had held the estate by virtue of the family custom separately from the other co-members of the joint family, he would have been entitled to mortgage it during his life, although it would not have been binding upon the other members of the family after his death. Their Lordships, therefore, do not attach that importance to this document which the Subordinate Judge appears to have done.

The document No. 10 of the 4th February 1873 has next to be considered. It is a document by which some of the brothers sold a portion of land to the widow; it is not important, so far as the sale is concerned, except that it shows that they were treating themselves as separate and not as members of a joint family; but it is important as showing that in the document itself the defendant is described as the zemindarini of this zemindary. She is described as "the widow of the late Sundarappa, as zemindarini" of the particular zemindary, and that document is attested by the plaintiff himself. It is not always that a witness to a document knows what the contents of the document are, or how the parties have been described, but it frequently occurs in native documents that a man signs as a witness to show that he is acknowledging the instrument to be correct; but whether this is so or not, it appears that she was described as the owner of the zemindary, and that the plaintiff attested the document as a witness. No very great importance, however, can be attached to this document, but it appears that it was entered into on the 4th February 1873, after the date of the kararnamah of the 11th June, from which it appears that the plaintiff was about to commence his suit, and in which he agreed with other members of the family that if they would advance the money they were to have a share in the estate, if he recovered it. It is hardly likely that he would intend to admit this lady to be entitled to the zemindary, although as she was then in possession she might be described as the zemindarini. On the other hand, their Lordships do not think that the kararnamah of the 11th June 1870 is any evidence against the defendant. It was executed by members of the family in the absence of the defendant who was no party to it, and consequently anything that

1879

VADREVU RANGANAYAKAMMA v. VADREVU BULLI RAMAIYA.

Judgment.

they might say in it would not be evidence against her. But it does bear upon the case, in so far as it shows that the parties to it were dealing with each other, not as members of a joint family, but as persons entitled to separate estates.

Looking, therefore, to the terms of the sunnud itself, and to the subsequent conduct and acts of the parties, their Lordships have come to the conclusion that the Subordinate Judge was right in his construction of it, and that the document amounted to an agreement by which the joint family estate was divided among the several members of the joint family, and that the zemindary in dispute fell to the lot of Somappa, the second, as his separate property.

Another observation is to be made, viz., that after the death of the husband of the defendant the widow was recognized by the Government as the owner of the zemindary. It was known that she took possession of the zemindary, and that she was recognized by the Government as the owner of it, and yet no suit was brought by the plaintiff to recover possession until 1876, about 11 years after the death of Sundarappa, the second, the husband of the defendant, during the whole of which time the defendant had been in the quiet and undisturbed possession of the zemindary. That delay, after the parties must have known that the widow was in possession, is very strong evidence in support of the construction which the Subordinate Judge put upon the sunnud, and as showing that the parties considered that by that document Somappa the second took the zemindary as a portion of his separate estate upon partition.

As the zemindary became the separate property of Somappa the second, and descended to his son Sundarappa the second, it is clear that the widow was entitled to succeed upon the death of her husband. It, therefore, becomes wholly immaterial to decide who would have been entitled to succeed under the custom if the estate had remained a part of the joint family property. Very learned arguments were adduced on both sides upon that question, but their Lordships think it unnecessary to decide the point, and do not think it right to express any opinion now which might affect the interests of persons hereafter upon the death of the widow.

Under these circumstances, their Lordships are of opinion that the judgment of the Subordinate Judge was correct, and that the High Court were in error in overruling that judgment. Their Lordships will, therefore, humbly advise Her Majesty that the decree of the High Court be reversed; that the decree of the Subordinate Court be affirmed; and that it be ordered that the respondent do pay the costs incurred in the High Court. Further, their Lordships order that the respondent do pay the costs of this appeal. 1879

[CIVIL APPELLATE JURISDICTION.]

MAHOMED ZAHUR ALUM (PLAINTIFF) . . APPELLANT;

AND

CHUNDER CUMAR AND ANOTHER (DEFENDANTS). RESPONDENTS.

Construction of Deed—Rent Charge.

The defendants' ancestor granted to A and B an ikrarnamah in the following terms:—"In consideration of Rs. 4,952 due by me to you, and in lieu thereof, I do hereby grant and alienate to A and B, out of the whole and entire profits of my proper share in Mouzah X, the sum of Rs. 600 per annum, in equal proportion, free from for all incumbrances, and constitute them part owners thereof. The said A and B shall be at liberty to make joint collection with me, and to receive and enjoy in perpetuity Rs. 600: or upon division and partition of as much land as may yield to them Rs. 600, to make separate collection as from their own property. * * * * * * * * * * *

If in any way by sale, etc., the said mouzah shall cease to be my property, I agree to set apart, upon partition and division for A and B, as much land as may yield Rs. 600 in another of the mouzahs owned by me exclusively, and to that also, the same conditions as above shall be applicable." A applied to have his name registered as owner of a share in the mouzah sufficient to yield an income of Rs. 300 per annum.

Held, that under the ikrarnamah A had only a rent charge on the property.

APPEAL from a decision passed by the Officiating Judge of Allahabad, affirming the decree of the Subordinate Judge of Mirzapur.

The plaintiff sued upon an *ikrarnamah*, dated the 22nd December 1865, executed by Janessor Dass, the ancestor of the defen-

1879

MAHOMED ZAHUR ALUM v. CHUNDER CUMAR.

Statement.

dant Chunder Cumar in favour of Kazi Mahomed Zahur Alum and Munshi Hurbuns Sahai (who was made a co-defendant) claiming a right under that document to such a share in Janesor Dass' share in a mouzah called Athur as would yield to him Rs. 300 yearly after payment of Government revenue and village charges.

The ikrarnamah in question was as follows:—

"Whereas Kazi Mahomed Zahur Alum and Baboo Hurbuns Sahai, pleaders of the Court, are my old vakeels and well-wishers, and I have all along conducted my cases conformably with their good and salutary advice and counsel, and have been pleased and satisfied with their good work and good intentions towards me; and whereas besides this, the sum of Rs. 4,952 has, upon adjustment of accounts, been found due to them by me as their fees; and (2), therefore in consideration of the above claims, and in lieu of the above sum, I, the declarant, do hereby grant and alienate to the said two pleaders, out of the whole and entire profits of my proper share in a certain Mouzah Athur, purgunnah aforesaid, the sum of Rs. 600 per annum, in equal proportion free from all encumbrances and liabilities, and constitute them part owners thereof; (3), by virtue of this deed the said pleaders, and their representatives shall be at liberty to make collection jointly with me, the declarant, from my share in Athurkhas, and to receive and enjoy in perpetuity Rs. 600 per year, their dues out of the profits that may be left after payment of Government revenue and village charges; (4), or upon division and partition of as much land as may yield to them a profit of Rs. 600 per year, after payment of proportionate Government revenue, make separate collection as from their own property; and (5), as the Government revenue payable for the entire 16 annas of Mouzah Athurkhas is Rs. 675, a part thereof bearing the same proportion to the whole as the profit Rs. 600 to the profits of the entire 16 annas shall be payable for the share of the said pleaders; and (6), they shall pay such part of the Government revenue due on their share to me, the declarant, so that I may continue to pay the whole together into the collectorate; or (7), the said pleaders may themselves pay it into the Collector's treasury; and (8), if in any way by sale, &c., the said mouzah shall cease to be my property, I do

: to set apart upon partition and division for the said much land as may yield an annual profit of Rs. 600, f the mouzahs owned and held by me exclusively; hat also the same conditions adverted to above shall applicable; and (10), the said pleaders should, with promptitude, continue to look out for my welfare, and and counsels in connection with my cases as hereto-

4, the collections were made jointly. Then the plain- upon making collections on his own behalf, and sub- a Act VII of 1876 coming into force, applied that his be registered in respect of the share which he claimed rarnamah.

dant submitted that the plaintiff was entitled merely Rs. 300 in cash, but that he had no share in the

rdinate Judge held that the defendant's contention was he plaintiff was entitled only to receive Rs. 300 out of rofits of the share of Janessor Dass in the mouzah, might be at liberty to make separate collection from he land as would yield that sum.

the Officiating District Judge confirmed the order of urt.

iff thereupon preferred this second appeal.

nder Madhub Ghose, and Moonshee *Mahomed Yusoof*, llant.

hesh Chunder Chowdhry, for the Respondents.

ring judgment was delivered by the High Court (1):

se we see no reason whatever for interfering with the the Court below. We agree with the Subordinate nking that it was intended by the deed under which claims to give him only a rent-charge to the extent nnually on the property of the defendant in a certain nd, in the eighth clause of the said deed we think that its' ancestor reserved to himself the power to substi-

(1) PONTIFEX and MCDONELL, *J.J.*

1879

MAHOMED ZAHUR ALUM v. CHUNDER CUMAR.

Judgment.

tute, if he chose, other lands belonging to him, as security for that Rs. 300. We are fortified in this opinion by the fact that not only is there absent from this deed the common form of words that the grantee should have power to get his name registered in the Collectorate as owner, but there are other clauses in it which would otherwise be unnecessary, and with respect to which considerable trouble has been taken to define the precise powers which the grantee was to have. In our opinion those words do not give the grantee the power of demanding a separate estate in this land.

It seems to us that we need not now go beyond the declarations made by the Subordinate Judge. If the owner of the estate fails to make the annual payments of Rs. 300, then the plaintiff will be able to resort to his other remedies in the deed. At all events we agree with the lower Court's decision that the plaintiff had no other interest than that of an owner of a rent-charge on the property.

We therefore dismiss this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

Dec. 11th.

No. 103 of 1879.

KANTO PROSAD HAZARI . . (DEFENDANT) APPELLANT;

AND

ASAD ALI KHAN . . . . . (PLAINTIFF) RESPONDENT.

Limitation—Act IX of 1871, *Sched. II, Art.* 44—*Act XV of* 1877, *Sched. II, Art.* 45—*Regulation VII of* 1822, *Order under—Possession and declaration of title, Suit for.*

An order of the Board of Revenue under Regulation VII of 1822, declaring a particular person entitled to a settlement of certain lands, is no ground for declaring a third person who was no party to the settlement of proceedings in any stage, debarred under Art. 44, Sched. II of Act IX of 1871, (corresponding with Art. 45, Sched. II of Act XV of 1877,) from bringing a suit to establish his title in and recover possession of the lands after three years and within the general law of limitation.

APPEAL against the order of the Additional Judge of Chittagong, reversing the decree of the Moonsiff of Deang.

1879

KANTO PROSAD HAZARI v. ASAD ALI KHAN.

Judgment.

The plaintiff in this case sued the defendant Kanto Prosad Hazari and the Collector of Chittagong for a declartion of title to, and for possession of 16 dhurs 5 kanis 12 gundas of land, which, he alleged, appertained to a permanently settled talook of his. He also sued for the same relief in regard to 11 dhurs 10 gundas of land, which he alleged had accreted to the talook. He further asked that a map and settlement of these two parcels of land, granted by the Collector to the other defendant, should be set aside.

The map was dated 8th March 1869. The authority of the Board of Revenue to make the settlement was granted by a letter, dated 12th February 1873, but the final settlement was not made until the 25th September 1873.

The present suit was instituted on the 23rd September 1876.

It did not appear whether at the date of the settlement the plaintiff had made any claim to the lands.

The Moonsiff held that the plaintiff's suit was barred by Art. 4, Sched. II of Act IX of 1871, (corresponding with Art. 45, Sched. II of Act XV of 1877), and did not try the other issues raised.

The Additional Judge, however, considered, that if the allegations of the plaintiff, as to the parcel being part of his permanently settled talook and the other an accretion to it, were true, Art. 44, Sched. II of the Limitation Act, would not apply, and he accordingly remanded the case for retrial as to the truth of these allegations. The defendant Kanto Prosad appealed from this order.

Branson, and Baboo *Sreenath Banerjee*, for Appellant.

Phillips, Baboo *Sreenath Dass*, and Baboo *Aukhil Chunder Sen*, for the Respondent.

The judgment of the High Court (1), which was as follows, was delivered by

MORRIS, *J.* :— MORRIS, *J.*

The fact that the Board of Revenue passed an order on the 12th February 1873, declaring one Kanto Prosad Hazari, to be

(1) MORRIS and PRINSEP, *J.J.*

1879

KANTO PROSAD HAZARI v. ASAD ALI KHAN.

Judgment.

MORRIS, J.

entitled to the settlement of certain lands would be no ground for declaring the plaintiff, a third party, to be debarred by Art. 44, Sched. II, Act IX of 1871, from bringing a suit to establish his title in and to recover possession of those lands. If, however, at the time when the Collector took action under Regulation VII of 1822, in respect of those lands, or of a portion of them, the plaintiff claimed them as portion of his settled estate, and claimed to have a right to settlement of them with him, the Collector rejected his claim, his right to bring a suit to contest that rejection would, in our opinion, be limited to three years from the date of such order, or from an order of a superior authority, such as the Board of Revenue, rejecting his claim. We think, therefore, that the Judge was right to direct the case to be remanded to the lower Court to be retried. If, on the one hand, any order has been passed by the Collector rejecting the right of the plaintiff to settlement in respect to the whole or a portion of the lands in suit, and no steps have been taken by the plaintiff to set that order aside until now, or if he has appealed to the Board of Revenue and the Board of Revenue has confirmed the order of the Collector, then, unless three years have not elapsed from the date of such final order, the plaintiff's suit will be barred by limitation. But if, on the other hand, his right to settlement of these lands as forming a portion of his estate has not been subject to the order under Regulation VII of 1822, by the Collector or Board of Revenue, then his title in them and his right to recover possession of them should be enquired into in the ordinary course. The appeal is, therefore, dismissed with costs.

[ORIGINAL CIVIL JURISDICTION.]

SHIBKRISTO SIRCAR . . . . . 1879 Dec. 19th

AND

ABDOOL HAKEEM . . . . . .

Plaint, Amendment of—Variance between case in plaint and evidence—Civil Procedure Code (Act X of 1877), sec. 53.

In a suit to recover the balance of an account which the plaintiff in his plaint alleged to be due from the defendant for the hiring of certain boats, the defendant denied that the boats had been hired by him, stating that he had been employed by the plaintiff merely as an agent to find hirers—upon the evidence, it was found that the defendant's version was correct—

Held, that the plaintiff was not entitled to an account and discovery from the defendant as his agent, such relief not having been asked for in his plaint.

Held, also, that the plaintiff could not be allowed to amend his plaint by adding an alternative prayer in order to meet the view of the case appearing on the evidence.

IN this case the plaintiff sued the defendant to recover the sum of Rs. 3,121, the balance of an account for the hiring, as he alleged, of certain cargo boats. No other relief was asked for in the plaint.

The defendant in his written statement denied that he had hired except on particular occasions, when he had paid for the hire (of the boats engaged by him) hired the plaintiff's boats. He admitted, however that he had acted as agent for the plaintiff for the purpose of finding hirers for his boats.

Upon these allegations the case came on for hearing, and witnesses were examined on both sides. From the evidence produced it appeared that the defendant's account of the relation between himself and the plaintiff was the correct one.

Thereupon the plaintiff, by his Counsel, submitted that if he were now entitled to an account and discovery from the defendant, was entitled to have leave granted to amend his plaint in order to meet the state of facts appearing on the evidence.

1879

SHIBKRISTO SIRCAR v. ABDOOL HAKEEM.

Judgment.

T. A. Apcar and *Mitter*, for the Plaintiff.

Kennedy and *Bonnerjee*, for the Defendant.

T. A. Apcar.—It is for the Court, on the statements in the pleadings, to determine the real issue—*Arbuthnot* vs. *Betts*, 6 B. L. R., 273. On the authority of that case the Court may now order the defendant to account to the plaintiff as his agent.

[WILSON, *J.*—But in that case the plaintiff was in either view entitled to the same relief, viz. the price. The question raised was fully considered by the Privy Council in *Eshen Chunder Singh* vs. *Shama Churn Bhutto*, 11 M. I. A. 7, where it was laid down that the state of facts originally alleged and pleaded by the plaintiff should not be departed from.]

But under section 53 of the Civil Procedure Code the plaint may be amended at any stage, and even now we are entitled to ask that an alternative prayer for relief, on the assumption of agency, may be inserted. See *Lakshmibai* vs. *Haribin Ravji*, 9 Bom. H. C. R., 1.

[WILSON, *J.*—The plaintiff had full warning of the case alleged by the defendant, and it is too late now to ask for amendment.]

Kennedy for the defendant contended that the plaintiff ought not to be allowed to make a case in contradiction of that which he had set up. He relied on *Eshen Chunder Singh* vs. *Shama Churn Bhutto*, 11 Moore's I. A.; *Denniston* vs. *Little*, 2 Sch. and Lef. 11, note; *Lukhee Kanto Dass Chowdhry* vs. *Sumeerudi Lusker*, 13 B. L. R., 243.

The following judgment was delivered by

WILSON, *J.* WILSON, *J.*:—

The case of the plaintiff, as set out in his plaint, is that the defendant hired cargo boats of him, and that a balance of Rs. 3,121 is due to him on that account. He prays judgment for this sum without any other prayer for relief.

The defendant's case, as set out in his written statement, is that he was not the hirer of the plaintiff's boats, but was only employed as an agent to find hirers for them, except in the case of certain boats for which he had paid.

1879

SHIBKISTO SIRCAR v. ABDOOL HAKEEM.

Judgment.

WILSON J.

ve come to the conclusion on the whole of the evidence
e defendant's version is the true one, and that the plain-
not recover against the defendant as the hirer of his

is said, however, for the plaintiff, that even on the defend-
vn account of the facts he was entitled to an account and
ry. *Primâ facie* no doubt a principal is entitled to such
gainst his agent. But I think it clear that the plaintiff
have such relief in this suit as at present framed. I can-
e him relief for which he has not asked, on the ground
te of facts, the contrary of that which he has asserted.
s said, however, that the plaintiff might be allowed to
his plaint to meet this view of the case. I think, however,
e parties have come to trial to determine which of two
s true, it would be a dangerous precedent to allow the
' to amend, by abandoning his own story and adopting
the defendant, and asking relief on that footing. The
whether on that footing the plaintiff is entitled to relief
o which in such case the defendant's attention has not
lled, and as to which he has had no opportunity of
ng. Nor would much have been gained by amending,
uld in fairness only have been on the terms of the
's paying all the costs of the suit. The suit will be
d with costs.

[CRIMINAL REVISIONAL JURISDICTION.]

1879

Dec. 14th.

IN THE MATTER OF TOKEE BIBEE vs. ABDOOL KHAN.

Insolvent Act (11 and 12 Vic. c. 21,) section 13—Protection Order—Presidency Magistrates Act (IV of 1877) section 234—Maintenance, Arrears of, whether a "debt or liability."

Under a protection order granted by the Insolvent Court under section 13 of the Insolvent Act (11 and 12 Vic. c 21), an insolvent is protected from arrest or imprisonment in respect of arrears due for maintenance ordered by a Presidency Magistrate under section 234 of Act IV of 1877, when such arrears have been included in his schedule.

Quære.—Whether the protection applies to arrears of maintenance accruing due subsequently to the making of the schedule.

IN this case an application under section 147 of the High Courts Criminal Procedure Code, was made to Mr. Justice WILSON, sitting as a Judge on the original side of the Court, that a proceeding before one of the Presidency Magistrates should be transferred to the High Court for the purpose of having the order made therein quashed.

The facts of the case were as follows:—In 1878, Tokee Bibee, the wife of Abdool Khan, instituted proceedings against him for maintenance under the Presidency Magistrates Act (IV of 1877), and by an order of the 5th June 1878 he was ordered to pay her Rs. 15 a month. On the 10th May 1879, Abdool Khan filed his petition in insolvency, and the usual vesting order was made. On the 10th June he filed his schedule. At that time there were arrears of maintenance due, including the amounts payable in April and May, and these arrears were inserted in the schedule. On the 1st July the insolvent applied for *interim* protection, and the hearing was adjourned until the 12th August with protection in the meantime. On the 12th August he applied for his personal discharge, and the hearing was adjourned for six months with protection in the meantime.

On the 3rd July, the wife commenced proceedings before the Magistrate under section 234 of the Presidency Magistrates Act to enforce payment of the April and May arrears of maintenance.

The insolvency proceedings were brought before the Magistrate. He was of opinion that they were not a bar to his making an order under the section just mentioned, and on the 27th August, he made an order that Abdool Khan should deposit in Court the April and May arrears or undergo rigorous imprisonment for a fortnight in default.

This was the order complained of.

Trevelyan, for the Insolvent.

Paul (Advocate-General,) for the Government.

Tokee Bibee appeared in person.

Paul (Advocate-General).—Sections 47 and 61 of the Insolvent Act, which deal with the effect of a final discharge under the Act, have reference only to what may be called civil liabilities. The words used are "debts or liabilities" and "debts, claims or demands." The maintenance ordered by the Magistrate cannot come within these words. Nor does it come within the description of debts proveable in bankruptcy under section 31 of the English Bankruptcy Act of 1869, for it is not a liability which can be ascertained, the time of maintenance being indefinite. As to what a debt is, see Debtors Act, 1869, (32 and 33 Vict. C. 62), sections 4 and 5, and *Harvey* vs. *Hall*, L. R. 11 Eq., 31.] An order in a criminal case for the payment of money is in the nature of a penalty and disobedience to the order is a contempt of Court—*Martin* vs. *Lawrence*, I. L. R. 4 Cal., 655.

In *Hewitson* vs. *Sherwin*, L. R. 10 Eq., 53, it was held that an order by the Court for payment of costs constituted a debt within the Debtors Act, 1869, but that was a civil case.

If section 13 of the Insolvent Act be taken by itself, the word "liability" is wide enough to include the order in this case, but the words already referred to as used in the other sections of the Insolvent Act clearly point to civil debts.

Trevelyan.—There are decisions, which support my contention, as to analogous orders made by the Divorce Court for alimony—see Brown on Divorce, p. 134. In *Dickens* vs. *Dickens*, 51 L. J. P. and M., 183, it was held that under an order for discharge under the Bankruptcy Act, 1861, a bankrupt was protected from proceedings to enforce payment of alimony for the non-

1879

In re TOKEE BIBEE *v.* ABDOOL KHAN.

Judgment.

payment of which he had been attached before the order of discharge.

The order here, I submit, is a civil process exercised merely as a matter of convenience by the Police Court, for securing payment of money which the insolvent was found liable for.

The money here due for maintenance does not come within the liabilities excepted from the order of discharge, by section 62 of the Insolvent Act.

As to what is a civil and what is a criminal proceeding, see *Eglinton's* case, 2 Ell. and B., 717; *Reg.* vs. *Governor of Newgate*, 6 B. and S., 376. See p. 391.

[WILSON, *J.*—Has it not been held in England that bastardy proceedings before Justices are not criminal but civil proceedings ?]

[*Paul.*—It was so held in the case of *Reg.* vs. *Fletcher*, L. R. 1 C. C., 320.]

This case is analagous to cases in England, of warrants for non-payment of poor rates, which, it would appear, were discharged by a protection order under section 112 of the English Bankruptcy Act of 1861.—See 2 Archibold's Bankruptcy, 907.

(The case of *Bancroft* vs. *Mitchell*, L. R. 2 Q. B., 549, was also referred to.)

The following judgment was delivered by

WILSON, *J.* WILSON, *J.* :—

This was an application under section 147 of the High Courts Criminal Procedure Act to transfer to this Court a proceeding before a Presidency Magistrate, for the purpose of quashing an order made therein.

(The learned Judge then stated the facts as above, and proceeded as follows :)

The section under which maintenance may be ordered, section 234 of the Presidency Magistrates' Act, is as follows :—

"If any person, having sufficient means, neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, a Presidency Magistrate may, upon due proof

y evidence, order such person to make a monthly allow-
the maintenance of his said wife, or child, or both, at
ıthly rate, not exceeding fifty rupees in the whole, as
gistrate thinks fit, and to pay the same to such person
agistrate from time to time directs.
ı allowance shall be payable from the date of the

ıy person so ordered wilfully neglects to comply with
r, a Presidency Magistrate may, for every breach
der, issue a warrant for levying the amount due in
hereinbefore provided for levying fines; and may sen-
ch person, for each month's allowance remaining unpaid,
ıonment for any term not exceeding one month.
ided that if such person offers to maintain his wife on con-
' her living with him, and his wife refuses to live with
h Magistrate may consider any grounds of refusal stated
wife, and may make the order allowed by this section not-
ding such offer, if he is satisfied that such person is
adultery or that he has habitually treated his wife with

wife shall be entitled to receive an allowance from her
under this section if she is living in adultery, or if with-
cient reason she refuses to live with her husband, or if
living separately by mutual consent."

section under which an *interim* protection is granted
ın 13 of the Insolvent Act (11 and 12 Vict. c. 21). It is
vs :—

. be it enacted that in any case where a petition shall
ın presented by an insolvent debtor as aforesaid, or an
ısolvency shall have been adjudged to have been com-
ıs aforesaid, it shall be lawful for the said Court, after
ɜ of the schedule required by this Act, if under the
tances it shall appear proper, to make an interim order
protection of the insolvent from arrest, and any such
order may apply either to all the debts or liabilities
ed in the said schedule or to any of them, as the Court
ık proper, and may commence and take effect at such
the Court shall direct, and any such order may be recalled

1879

In re TOKEE BIBEE *v.* ABDOOL KHAN.

Judgment.

WILSON, *J.*

and may be renewed as to the Court may appear proper, and any such order, when so made, shall protect the person to whom it shall be given from being arrested or detained in prison for any debt or liability to which such order shall apply within the limits of the towns of Calcutta, Madras, and Bombay, respectively, or any other place within the territories under the Government of the East India Company; and any person arrested or detained contrary to the tenor and effect of any such order shall be entitled to his discharge out of custody upon application to any Court or Judge which or who shall have power to set at large persons illegally detained in custody under the process by virtue of which such person shall have been arrested or be so detained. Provided always, that no such order shall operate as a release or satisfaction of the debt or demand of any creditor, nor prejudice the right of any such creditor to arrest the insolvent, whether he shall or not have been previously arrested for the same debt or demand, in case the order shall be recalled, or shall fall by reason of the petition of the insolvent being dismissed, or the adjudication being reversed."

The Advocate-General argued that, in determining what is a "debt or liability" under this section, we must look forward to the later sections dealing with final discharge, namely, section 47, which, instead of "debt or liability," uses the words "demand" and "debt or demand," section 61 which again changes the phrase to "debt, claim or demand," and section 62 which excepts certain matters from the operation of the Act.

It could hardly be seriously contended that section 62 applies; maintenance ordered to be paid is not a fine, penalty or forfeiture.

But it was said the language of sections 13, 47, and 61 points to matters purely civil, not to anything of a criminal character, and that the liability now in question is a criminal liability. Two grounds were given for saying that the liability is a criminal one; first, because the whole proceedings are before a Criminal Court; secondly, because non-payment of maintenance may be punished with rigorous imprisonment. Now the precise liability in question is the liability to pay sums of money which have become payable under an order for main-

tenance. That is, *primâ facie*, a purely civil liability, and a debt, or liability, or claim, or demand, within the meaning of the Insolvent Act. The fact that the debt is created, and may be enforced by a Criminal Court, cannot affect the matter. Many purely civil rights are, for convenience sake, made enforceable in Criminal Courts. Nor, in my opinion, does the fact that penal consequences have been attached to the non-payment of a debt make it less a debt. Bastardy proceedings before Justices have been held in England to be civil not criminal proceedings. *Regina* vs. *Barry*, 28 L. J. M. C., 86; *Regina* vs. *Fletcher*, L. R. 1 C. C., 320. And this case is very similar.

I think that the arrears of maintenance included in the schedule are a debt or liability within the meaning of section 13 of the Insolvent Act, and that the protection order protected the insolvent from arrest or imprisonment in respect of it. The proceedings will, therefore, be removed into this Court, and the Magistrate's order quashed.

I say nothing as to the effect of the insolvency proceedings upon any maintenance accruing subsequently to that in the schedule, and of course there is nothing in this decision to interfere with the Magistrate's discretion under section 235 of the Presidency Magistrates Act.

[ORIGINAL CIVIL JURISDICTION]

1880
January 8th.

No. 2 of 1880.

PELL AND VALETTA.

Civil Procedure Code, Act X of 1877, section 375—Practice of High Court—Consent Decree.

According to the practice of the High Court, a consent decree upon a compromise will not be granted, unless the suit be entered in the Cause list of the Court.

IN this case *Mr. J. D. Bell* (Standing Counsel) applied on behalf of the plaintiff, that the Court should pass a decree in terms of a compromise which had been entered into between the plaintiff and the defendant. He stated that the case had not been set down for hearing in the Cause list of the Court, but submitted that under section 375, it was competent for the Court, upon the consent of the other side, (for whom *Mr. Hyde* appeared) to record the compromise and pass a decree thereon. Rules 279 and 298, Belchamber's Rules and Orders, pp. 157 and 161, were referred to.

The defendant had entered an appearance.

WILSON, *J.* :—

It has been the practice of the Court for many years not to allow a decree upon consent unless the case is put down in either the defended or the undefended peremptory Cause list of the Court. If the case is in the undefended list, a consent decree can be taken in Chambers; if in the defended list, in Court. That practice must, I think, be followed in this case.

[PRIVY COUNCIL.]

DARIMBYA DEBBYA *vs.* NIL MONEY SINGH DEO.

1879
June 28th.

Abatement of rent, Suit for—Delay.

In 1859, G entered into negociations with respect to the purchase of a certain talook at a premium of Rs. 42,411 and an annual rent of Rs. 48,070, and in January 1860 he signed a sale-bund which obtained an enumeration of the mouzahs purchased, the actual sale being completed in the 2nd June following. Until his death in December 1861 he paid the stipulated rent according to the terms of the deed. Subsequently his widow brought a suit for abatement of the rent on the ground that her husband had been misled as to the amount of rent payable by the under-tenants. *Held* (affirming the decision of the High Court of Calcutta) that under the circumstances the suit could not be maintained.

APPEAL from a decision of a Divisional Bench of the High Court at Calcutta, (BAYLEY and PHEAR, *J.J.*) dated 7th May 1868.

Doyne, for the Appellant.

The judgment of their Lordships of the Judicial Committee (1) was as follows:—

In this case we have to deal with two suits. The first suit is by the widow of one Gobind Pershaud Pundit against the Rajah of Pachete, in which she seeks to have a certain contract of sale which her husband entered into with the Rajah reformed, on the ground that her husband was induced to enter into it by fraudulent misrepresentation on the part of the Rajah. She states her case in this way: That the Rajah settled a talook consisting of 247 mouzahs with her husband in consideration of a premium of Rs. 42,411, and a rent of Rs. 48,070; and she alleges that her husband, "relying on the word of the Rajah, gave a kabuliut without inquiring into the mouzahs and the rents; and on commencing to make the collections it has

(1) Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

1879

DARIMBYA DEBBYA v. NIL MONEY SINGH DEO.

Judgment.

appeared since that time up to the present that, with regard to the mouzahs, the list of which and the particulars of the rents thereof which are objected to, are written below according to the objections of their tenants and the persons in possession and on account of certain lands not being ascertained, the rent of Rs. 16,045 5 gundas 1 cowrie was not realized from the mehal. Information of this was given to the zemindar defendant, and he promised to grant a remission of the rents objected to; but up to this time he has not made any settlement. I therefore bring this suit for obtaining an abatement of the rent of Rs. 16,045 5 gundas 1 cowrie, and a refund of the consideration money proportionate to that amount."

It would appear that the husband of this lady was a man of considerable property, of much intelligence and enterprise, and that he bought on the 2nd June 1860 a putnee talook of the Rajah of Pachete of great extent, comprising no less than three pergunnahs, and acquired with that putnee the right to receive rents from a number of under-tenants who held under different tenures. The bynamah, or deed of sale, of this property, is the document which the widow seeks to have reformed. On the other hand, the Rajah brought against the widow an action for the amount of rent due. The course of litigation may be thus described: The case, in the first place, came before a Subordinate Judge, who came to the conclusion that no case of fraud had been made out against the Rajah upon the evidence, chiefly documentary, then before him; and further intimated that if a case of fraud had been made out, the plaintiff, although she might be entitled to set aside the contract, was not entitled to the relief she prayed for. An appeal was preferred from this judgment to the High Court, and the High Court, on the 2nd May 1864, intimated that there was some *primâ facie* evidence of fraud, inasmuch as it appeared that, at all events with respect to some of the mouzahs mentioned in the bynamah, there had been a material misrepresentation on the part of the Rajah of the rents which were received from them. Accordingly the case was remanded for further inquiry. Upon that a local investigation by an Ameen was directed by the Principal Sudder Ameen, the report of which extends over upwards of 100 pages. The Ameen

ired with reference to each of the several mouzahs or tenures prised in this putnee talook—in the first place, what rent was tioned in the deed of sale; secondly, what rent the plaintiff d as realizable; thirdly, what the plaintiff stated as unrea- le; fourthly, what was proved to be the excess of rent men- d in the deed of sale above that was actually realizable by the tiff, and then the rent of which the plaintiff is entitled to batement, and the amount of consideration money which she entitled to have refunded. The Ameen, applying this tigation to each of the mouzahs separately, came to the con- on, with respect to a great number of them, that the plain- was unable to obtain as much rent as that which the late lit paid to the Rajah, and which the Ameen appears to have med to be that which the tenants had before paid to the h; and reported that the plaintiff was entitled to relief the footing of the difference between the rent realizable, that which ought to have been realizable according to this . The defendant, the Rajah of Pachete, did not appear before Ameen, on the ground that he had preferred an appeal to the Council against the judgment remanding the case. Their ships agree with the High Court in regarding this as an ficient reason. The report of the Ameen was confirmed, some reduction of the amount, by the judgment of the cipal Sudder Ameen, who found that gross fraud was prac- by the Rajah upon the plaintiff; he also found that in a ment, which will be subsequently referred to, the "sale- ," as it is is sometimes called,—there was a forgery on the of the Rajah. The High Court reversed the decision of the cipal Sudder Ameen. They came to the conclusion that was no forgery in the sale-bund, and that there was no ient fraud proved on the part of the plaintiff to entitle her e relief which she prayed. They also intimated a very s doubt whether, even assuming that the plaintiff had been led to set aside the contract on the ground of fraud, she was led to the remedy which she sought. The High Court also ed the right of the defendant Rajah to obtain the full t of rent which he claimed. From this judgment the t appeal is preferred.

1879

DARIMBYA DEBBYA v. NIL MONEY SINGH DEO.

Judgment.

It is to be observed that the late Pundit entered into negociations with respect to this purchase in the year 1859. He signed the sale-bund, which contained an enumeration of the mouzahs purchased, together with the rent payable for each, on the 24th January 1860—that is, five months before the actual deed of sale was executed; and the observation arises which has been made by the High Court, that undoubtedly he had time during that interval, if he were so minded, to make any inquiries he pleased for the purpose of satisfying himself on the subject of his purchase. Whether he did make any inquiries or not there is certainly no direct evidence. There is a letter from him by which it appears that he was disposed to take so much of the property as lies in one of the pergunnahs, namely, Chowrasee, at 50 per cent. above the current rent, a letter which seems to have been ignored by the Principal Sudder Ameen. It further appears that on one or two occasions he did make representations to the Rajah with respect to a difficulty which there was in obtaining the rent from some of the mouzahs, and that the Rajah paid attention to his remonstrances. The value of this portion of the evidence is but slight; but as far as it goes it indicates that he was awake to his own interest. The bynamah was executed on the 2nd June 1860, and contains a schedule corresponding, with a slight variation to the list in the sale-bund of the rents which he is to pay to the Rajah. Gobind Pershaud Pundit lived for eighteen months after the completion of the sale. On account of some riot or affray he was imprisoned in December 1860; he remained in prison for twelve months and died in December 1861. It appears that throughout the whole of that time he paid the stipulated rent according to the terms of the deed, making no complaint of any misrepresentation which had been practised upon him, and their Lordships cannot help thinking this a very material consideration. In the course of eighteen months he and his agents would have time to ascertain what rents he was able to realize and what the general state of the property was; and there seems a strong presumption that, if he had any reason to suppose that he had been defrauded, he would have made some complaint in his lifetime. It is only after his death that his widow, for the first time, sets up the case of her husband having been imposed

upon. That case is supported by the evidence of two witnesses. Neither of them is the dewan or the collector of the Pundit, although it appears that the Pundit had a dewan. But the first of them states that he became collector for the widow after the death of the Pundit. The effect of the evidence of those two witnesses, servants of the plaintiff, is in general terms that the Pundit relied upon the representations of the Rajah, that he was shown the Rajah's rent roll, and that he agreed to give the sums which are specified in the deed of sale on the strength of that rent roll. On the other hand, a number of witnesses were called on the part of the Rajah, who swore that the Pundit was informed that the jummah entered in the rent roll was not in all cases that which was received, but in several cases a good deal more. It is stated that he, being a speculative man, and the owner of coal mines, silk and indigo factories, and having extensive operations, took this land, a large portion of which would appear to be waste, with the view of cultivating it or using it in various ways ancillary to the trades which he was carrying on. There is also evidence that there had been offers from other persons of an additional rent amounting to 50 per cent. upon so much of the property as lies in Pergunnah Chowrasee, one of the three pergunnahs in which the property was situated.

If these witnesses were to be believed, undoubtedly there would be no case of imposture which would entitle either the Pundit or his representatives to set aside the sale. With respect to the alleged forgery, their Lordships agree with the High Court that it is by no means established. Under these circumstances, having regard to the probabilities of the case, to the fact that the action was not brought until the person who alone was able to throw much light upon it, as far as the plaintiff's case was concerned, was dead, and considering the character of the evidence, their Lordships have come to the conclusion that, although there may be some suspicion of misrepresentations having been made to the Pundit, no sufficient case of fraud has been made out to induce them to reverse the decision of the High Court.

They think it right further to observe that they must not be understood as intimating any opinion that even, if the plaintiff would have been entitled to set aside the contract on the ground

1879

of fraud, she would have been entitled to such relief as she seeks in the present suit.

On these grounds their Lordships will think it their duty humbly to advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal. Inasmuch as the Rajah has not thought fit to appear at the bar, the appeal will be dismissed without costs, although some costs may perhaps have been incurred.

[PRIVY COUNCIL.]

June 13th.

RAM CHUNDER BYSACK . . . . . .

AND

DINONATH SURMA SIRKAR . . . . . .

Evidence—Sale in execution—Benamee—Judgment-debtor, Purchase for.

Evidence raising presumption of purchase at a sale in execution being made *benamee* for the judgment-debtor discussed.

[Judgment of the High Court at Calcutta reversed.]

APPEAL from a Decision of a Divisional Bench of the High Court at Calcutta.

Cowie, Q.C., and *Doyne*, for the Appellant.

C. W. Arrathoon, for the Respondent.

The following judgment was delivered by their Lordships of the Judicial Committee (1) of the Privy Council :—

This is a suit which was commenced on the 8th January 1874 by the plaintiff, who seeks to recover possession of a 12 annas share in certain mouzahs which he claims to be his property, and out of which, he says, he was wrongfully ousted.

It is necessary for him to make out his title, and the way in which he attempts to make it out is under a sale in execution of a decree of the 31st May 1843, of the Principal Sudder Ameen of Faridpore. The sale under the execution did not take place until the 18th June 1863, when one Anund Lochun Nundi, the

(1) Sir JAMES W. COLVILE, Sir BARNES PEACOCK, and Sir ROBERT P. COLLIER.

lefendant No. 3, became the ostensible purchaser of the property. The plaintiff, however, says that Fakiruddin *alias* Azimuddin as the real purchaser, and that he, the plaintiff, subsequently purchased the property from Fakiruddin.

Two objections are made to the title of Fakiruddin as the purchaser of the property:—First, it is said that the Principal Sudder Ameen of Faridpore, who issued the execution under which the sale took place, had no jurisdiction to issue it, inasmuch as the district of Dacca was divided between two Principal Sudder Ameens, and that the property, or a great portion of it, as situate, not within the jurisdiction of the Principal Sudder Ameen of Faridpore, but within that of the Principal Sudder Ameen of Dacca. The first objection, therefore, was that the execution was entirely void for want of jurisdiction on the part of the Judge who issued it. The next objection was that, assuming the execution to have been valid, the purchaser under it by Fakiruddin was a fictitious purchase for the benefit of the judgment-debtor, Gorib Hossein, who was the representative of the original debtor Mahomed Joki Chowdhry. The first defendant claimed as a purchaser under a sale in execution against the said Gorib Hossein on the 7th June 1865, subsequent to the execution under which Fakiruddin purchased, and he, the first defendant, had been put into possession under his purchase.

Their Lordships will, in the first place, deal with the question of fictitious purchase, because if the purchase was fictitious the defendant Fakiruddin obtained no title under it, and the property remained the property of Gorib Hossein, whether the Principal Sudder Ameen had jurisdiction or not. The Judge of the First Court, at page 198 of the Record, deals with the question of jurisdiction. The fourth issue which was raised in the case was whether the purchase by Fakiruddin was *benamee* for Gorib Hossein or not. The Judge of the First Court did not come to any express finding or declaration with reference to that issue. The whole of his argument, however, tends to show that in his judgment that issue ought to be found in favor of the first defendant. He says:—"The first sale, the defendant argues, was collusive and fictitious. His pleader shows that Gorib Hossein was indebted to some (?) In execution of a money-decree the

1879

RAM CHUNDER BYSACK v. DINONATH SURMA SIRKAR.

Judgment.

claim which was upwards of Rs. 2,000—the valuable property which, according to the plaintiff's estimate of the value, is worth more than Rs. 10,000—was sold for Rs. 500; but still the decree-holder, who had a claim for upwards of Rs. 2,000, did not purchase it, and allowed the servant of defendant, who was a friend to Gorib Hossein, the judgment-debtor, to bid for it. Again, defendant No. 2 purchased it for a nominal price of Rs. 500, but did not proceed to take possession of the properties till the same properties were advertised for sale in execution of another decree. These facts the defendant takes as the evidence of collusion, and he pleads therefore that Gorib Hossein, in order to give color, went on ostensibly to object to the confirmation of the sale, but his endeavour was in reality to create a title in favour of defendant No. 3 fictitiously, and himself to retain and enjoy possession of the property to the prejudice of his other just creditors. The first auction sale is dated 1st June 1863, the date of advertisement of the second sale is 31st March 1865, and the second sale took place on the 2nd June 1865; but the debtor, Gorib Hossein, continued to be in possession of the property and continued to discharge the public revenue on account of the estate down to the second auction. The first auction-purchaser, after a lapse of two years, and after the second sale, applied to the Principal Sudder Ameen of Faridpore for delivery of possession of the property. The date of delivery is Assar 1272 B. S., and the date of dispossession by the defendant is Bhadro of the same year, that is, a month after the delivery. These circumstances go to a great extent to speak in favor of the defendant's argument. It is certain that the judgment-debtor was in possession down to the second sale, and the attempt of defendant No. 2 (plaintiff's vendor) to take symbolical possession after the second sale does not sufficiently prove that he was in actual possession of the property. Under the circumstances I am clearly of opinion that the defendant No. 1, who by virtue of a legal title entered into possession of the property, is entitled to oppose any, or to dispute the title of any who may come to take possession from him. The question therefore comes, whether the first auction sale was a valid sale, and whether the first auction-purchaser acquired a valid title." The High Court, in

lealing with that portion of the judgment, say, at page 208: 'Now as to the question of *benamee*, it seems to us that there ras no evidence to rebut the ordinary presumption in favor of he ostensible purchaser." The ostensible purchaser really was ot Fakiruddin, but Anund Lochun Nundi. He was the person n whose name the property was purchased. "The delay which as been relied upon is only a delay of about six or seven onths, because it appears that the purchaser was kept at bay y the judgment-debtor, who disputed the sale, appealed against he order rejecting his application, and continued those pro-eedings down to August 1864." The High Court treat those roceedings as real and *bonâ fide*, whereas the Judge of the ower Court stated that the defendant contended that they were ot *bonâ fide* for the purpose of getting rid of the sale, but ctitious proceedings taken for the purpose of giving strength the case that the purchase made by Fakiruddin had been ade for his own benefit and not for the benefit of the judgment-btor. The High Court make no remark with reference to the estion whether those proceedings were fictitious or not. They en go on: "It then appears that the papers were sent down the Principal Sudder Ameen with a view to further proceedings execution being taken on the 24th September 1864, and the rchaser made a petition to be put into possession on the 26th ay 1865. Therefore the delay which had to be accounted for s only a delay of a few months, and that is a circumstance ite insufficient of itself to get rid of the rights of the plaintiff der his purchase. That being so, and the onus on that part the case being entirely on the defendants, and the defendants having discharged themselves of it as far as that plea goes, judgment must be in favor of the plaintiff."

he substance of that decision is simply this,—that the mere y in taking possession on the part of Fakiruddin or of nd Lochun Nundi, was not of itself a sufficient badge of d to induce the Court to come to the conclusion that the hase by Fakiruddin was *benamee* for the benefit of the ment-debtor. They say:—"That being so, and the onus hat part of the case being entirely on the defendants, the defendants not having discharged themselves of it as

1879

RAM CHUNDER BYSACK v. DINONATH SURMA SIRKAR.

Judgment.

far as that plea goes, the judgment must be in favor of the plaintiff."

But there was evidence in the cause beyond that which was adduced as to the delay. There was the evidence of several witnesses. First that of a tenant at page 185 of the Record, to which Mr. Cowie has called their Lordship's attention, the evidence of Loknath Bonnerjee. He says:—"I am a tenant of the disputed mahal and hold lands therein. Formerly I used to pay rents to Mahomed Joki Chowdhry" (that is the judgment-debtor); "at present I pay rents to the defendant," meaning defendant No. 1. He does not say that possession was ever given, as far as his portion of the property was concerned, to Fakiruddin. He paid originally to the judgment-debtor, and subsequently to the defendant No. 1, who was the purchaser under the second execution.

Then again, at page 190 of the Record, there is some very strong evidence, that of the defendant's witnesses, to which the High Court did not allude at all. It is true it was not alluded to by the First Court. The Judge of that Court thought the delay sufficient of itself. But when the High Court thought that the delay was not sufficient, they ought, as it appears to their Lordships, to have referred to the evidence to see whether they believed or disbelieved the witnesses on the part of the defendant to prove that the sale was a fictitious one. Bharut Chunder Dey, the defendant's witness No. 1, at page 190, says:—"In the month of Jeyt of 1270 B.S., the disputed property was sold by auction at Faridpore on account of the debt of Gorib Hossein. Anund Lochun Nundi purchased it. Gorib Hossein paid the consideration money. I and Dagu Ram Dutt, and three sirdars went to Faridpore with the money. In the auction sale a bid of Rs. 500 was made, and the bargain having been struck in our name, we made over Rs. 500 to Anund. Anund made the said auction purchase for Gorib Hossein, Ajim Chowdhry, 'that is the *alias* of Fakiruddin, in a letter to Anund Nundi, requested him to make the auction purchase on behalf of Gorib Hossein. We took with us Rs. 3,003 for the auction purchase,' that was sufficient to cover the amount of the debt for which the sale was about to take place,

and we paid Rs. 500. Gorib Hossein's superintendent gave us the said money. Knowing that the disputed property might be worth Rs. 10,000 or Rs. 12,000, we went to purchase it."

There was other evidence corroborating this witness' testimony, to which it is not necessary to refer further. There was no witness to contradict the evidence of those witnesses. Anund Lochun Nundi was not called. Fakiruddin was not called. If the evidence of the witnesses who stated that the money with which the estate was purchased in the name of Anund Lochun Nundi was sent by the judgment-debtor was not true, why did not Fakiruddin or Anund Lochun Nundi, or both of them, come forward and state that the evidence was false, and that Anund Lochun Nundi purchased the estate for Fakiruddin with money which Fakiruddin had supplied. But no evidence of the kind was given. The witnesses for the defendant No. 1 were uncontradicted, and there is nothing on the face of the proceedings to lead their Lordships to believe that the evidence of those witnesses was untrustworthy, and ought to be rejected as the evidence of witnesses who had perjured themselves.

But, beyond this, when the estate was sold to the defendant No. 1, and when the defendant No. 1 was put into possession of it one would suppose that Fakiruddin, though he was only in constructive possession of the property, would have made an application to the Court, under section 246, of the Code of Civil Procedure, stating, "You have attached and are about to sell under the execution property which I have already purchased under a previous execution; do not sell this property, it is mine, and not that of the judgment-debtor," and then the Judge in a summary way would have decided whether or not the property had been purchased by Fakiruddin or not. But no such application was made.

It was suggested that probably Fakiruddin and Anund Lochun Nundi did not know that the property was attached and about to be sold under the second execution. Assuming for the present purpose that they did not, one would suppose that as soon as they did know it, that is to say, as soon as the defendant No. 1 was put into actual possession of the property, and had got the ryots to attorn to him, Fakiruddin, if his case had been

1879

RAM CHUNDER BYSACK v. DINONATH SURMA SIRKAR.

Judgment.

a genuine one, would have brought an action at once to turn him out and to contest his right to the property by virtue of the sale under the second execution. But he lay by, and no action was brought by Fakiruddin or by Anund Lochun Nundi for nearly nine years after the defendant had been put into actua possession of the property under his purchase, and then Fakiruddin commenced a suit in the Moonsiff's Court. The Moonsiff had not jurisdiction to try the cases to the extent of the value of the property; an objection was taken to his jurisdiction and then Fakiruddin sold the property to the plaintiff after the defendant No. 1 had been in possession for nine years, and when there was a dispute and an action pending respecting the title.

That suit was afterwards dismissed, and the plaintiff brought the present action in 1874.

Under these circumstances, there is sufficient evidence to satisfy their Lordships that the purchase by Fakiruddin, if indeed he had purchased in the name of Anund Lochun Nundi, was a purchaser *benamee* for the original judgment-debtor who furnished and supplied the money for that purpose.

Under these circumstances their Lordships think that the plaintiff is not entitled to recover. It is not necessary, therefore, to decide whether the Principal Sudder Ameen had jurisdiction to issue the execution under which the plaintiff's vendor purchased the estate, but their Lordships wish to be distinctly understood that they throw no doubt whatever upon the decision of the High Court by which it was held that the Principal Sudder Ameen had jurisdiction to issue the execution.

Under these circumstances, their Lordships will humbly advise Her Majesty that the decree of the High Court be reversed, the decree of the First Court affirmed, and the suit of the plaintiff be dismissed with costs in both the lower Courts.

The appellant must pay the costs of this appeal.

[PRIVY COUNCIL.]

ISSESSUR LALL SAHOO . . . . . APPELLANT; 1879 *July 15th.*

AND

UCHMESSUR SINGH . . . . . RESPONDENT.

Joint debt—Execution of Decree against joint family property.

In a suit against the grandmother and mother of A. and B. as their guardians, to recover rent due from the family, which was joint, in respect of a certain mouzah, which had been held by the father and grandfather of the infants, a decree for Rs. 8,000 was obtained on the 22nd March 1862, but it was ordered that "this decree will not be executed against the person and self-acquired property of the debtors, but against the property left by the two deceased leaseholders."

On the 9th April 1862 a second decree was obtained by the same plaintiff against A as heir of his grandfather, and it was ordered that it shoul d be executed only against the property left by the latter; and on the 16th April 1862 a third against his guardian, a similar direction as to execution being made.

In execution of the three decrees the plaintiff in the suits had the mouzah put for sale, and at the sale purchased it himself for Rs. 35,000. A. and B. subsequently sold to the plaintiff in this suit their right to recover the sum which the mouzah was charged with in respect of the last two decrees.

Held, that the mouzah had been properly sold in execution of all three decrees.

APPEAL from a decision of a Divisional Bench (GARTH, *C.J.*, nd MITTER, *J.*) of the High Court of Judicature, Calcutta.

Doyne, for the Appellant.

Cowie, Q.C., and *Graham*, for the Respondent.

The facts appear from the judgment of the Judicial Committee (1) of the Privy Council which was as follows :—

The points to be decided in this case arise in this way :—One ath Dass died in the year 1853 leaving a son, Ram Nath Dass, o died in the year 1855 ; and Ram Nath Dass left two sons, eaheb and Chooman. The Rajah of Ramnugger, as he has n called in the argument, that is to say, the guardian of the

(1) Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

1879

BISSESSUR LALL SAHOO v. LUCHMESSUR SINGH.

Judgment.

infant Rajah of Ramnugger, brought three suits in the year 1862 in respect of rent due from members of the family of Mosaheb and Chooman. In the first suit the judgment was given on the 22nd March 1862, and it seems that the plaintiff in that suit sued the widow of Nath Dass, and the widow of Ram Nath Dass as guardians of two young men who are assumed to be Mosaheb and Chooman under other names. The claim was for the recovery of rent, about Rs. 3,000 odd, which amounted to about Rs. 8,000 with interest and costs, and the statement is that Nath Dass and Ram Nath Dass took a lease of a certain Mouzah Rudarpore, and that the rent accrued in respect of that Mouzah. Then it is ordered "that this decree will not be executed against the person and self-acquired property of the judgment-debtors, but it will be executed against the property left by the deceased lease-holders."

Upon this judgment execution was issued against a certain Mouzah Muddunpore, which appears to have been bought in the year 1847 in the name of Ram Nath Dass. Whether it was bought by Ram Nath Dass for himself and separately, or as a member of the joint family, is a question to be hereafter discussed.

There were two other judgments, the nature of which will be subsequently referred to, dated respectively the 9th April 1862 and the 16th April 1862, whereby large sums were decreed beyond the Rs. 8,000 which was obtained by the first decree; and an order was obtained by the plaintiff empowering him to put up Mouzah Muddunpore for sale in satisfaction of all three decrees. This was done, and it was brought in by the plaintiff at, in round numbers, Rs. 35,000. Mosaheb and Chooman made no objections to this proceeding at the time, or indeed at all; but some three years afterwards they sold to the plaintiff in this suit their right to recover the difference between the Rs. 8,000, the sum obtained by the first decree, and the whole Rs. 35,000 for which Muddunpore was sold; that is to say, they claimed to recover the sum which Mouzah Muddunpore was charged with in execution of the last two decrees; and whatever rights they had the plaintiff has neither more or less.

It is necessary in the first place to advert to what was the

contention in the case. It was contended on the part of
:iff that the family of Nath and Ram Nath became separate
: the year 1839. It was alleged that at the time there was
rrel between Ram Nath Dass and his father, and that they
d to be joint in food. But on the part of the plaintiff there
carcely any evidence of separation of estate ; in fact, on his
:ase, there was some evidence that there was no separation
ate, and that Ram Nath Dass acquired no separate property.
first Court held that the separation had been proved, and
Mouzah Muddunpore was brought by Ram Nath Dass for
:lf and with his own property, although it certainly does
ppear, according to the evidence to the plaintiff, how he
have obtained the funds for purchasing it. The High
t reversed the decision on this point of the lower Court,
came to the conclusion that the family was joint, and had
separated ; and their Lordships agree with the High Court.
is being so, the consequence follows, as has been laid down
e in the very well known case of *Gopeekrist Gosain* vs.
apersaud Gosain, 6 Moore's I. A., 53, that the purchase
uddunpore by Ram Nath Dass would be assumed to be a
ase, not on his own account, but for the joint family,
hat Muddunpore would be joint family property.

now becomes necessary to examine the two decrees sub-
:nt to that of the 22nd March 1862 with respect to which
is no dispute. The next decree is dated the 9th April 1862,
n that suit Mosaheb Dass is sued as the heir of Nath Dass,
the decree is for the recovery of Rs. 39,000 on account of
rents of a certain Mouzah Ramnugger, and it is stated
Nath Dass had taken a lease of that from 1847 to 1854.
it is further ordered that this decree is not to be executed
st the person and self-acquired property of the defendant,
gainst the property left by the deceased leaseholder, Baboo
. Dass only.

ppears to their Lordships that, acting on the principle which
rs from their finding that this family was joint, it must be
ed that Mosaheb Dass is sued as a representative of the
y, and that it must further be assumed that Nath Dass, in
the lease of the mouzah, here referred to Ramnugger, in

1879

BISSESSUR LALL SAHOO v. LUCHMESSUR SINGH.

Judgment.

respect of which the rent was due, must be assumed to have taken it on behalf of the family, and that the debt must be deemed to be a debt from the family. With respect to the order as to the execution, it appears to their Lordships that the fair construction of it—though it may not be drawn up with much accuracy—is, that the decree is not to be executed against the self-acquired property of Mosaheb, but against the family property which is there described as that left by Nath Dass for the purpose of distinguishing it from the separate property which may have belonged to Mosaheb. The only difficulty with reference to the second and third decrees arises from a certain informality with which they have been drawn up. It appears to their Lordships that looking to the substance of the case, this second decree is a decree against the representative of the family in respect of a family debt, and that it is one which could be properly executed against the joint property of the family, and that Muddunpore was a part of that joint property.

The same reasoning applies to the third decree, although curiously enough the action seems to have been brought against the widow as the guardian of Mosaheb. Here there is the same direction with reference to the property, but substantially the same observations apply which have been applied to the former decrees.

Their Lordships have, therefore, come to the conclusion that, although there may have been some irregularity in drawing up these decrees, they are substantially decrees in respect of a joint debt of the family and against the representative of the family, and may be properly executed against the joint family property. Their Lordships have, therefore, come to the conclusion that the High Court has been right in dismissing the appeal from the lower Court.

This being their Lordships' view of the case, they do not think it necessary to go into the question, which was touched upon, but not decided, by the HighCourt, whether the plaintiffs, or either of them, were bound to dispute the sale of Mouzah Muddunpore in the execution proceeding, and were debarred from bringing this suit.

Two cases have been referred to—one of *Iskan Chunder Mitter* vs. *Buksh Ali Soudagur*, 1 Marshall's Reports, 614, and another

in 14 Moore's I. A., 605—*The General Manager of the Raj Durbhunga* vs. *Maharajah Coomar Ramaput Singh*, the effect of which may be stated thus: that in execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right. 1879

Under these circumstances their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty to affirm that judgment and to dismiss this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

RAM BANDHU . . . . . APPELLANT; *Nov.* 18*th*.

AND

KUSU BHATTU . . . . . RESPONDENT. No. 2568 of 1878.

Title—Possession, Presumption of, from evidence of title—Waste lands.

In disputes as to the right to possession of jungle lands, it is only in cases where neither party has exercised any acts of ownership over the lands in question that the Court may resort to evidence of title, and presume that the party proved to have the title has also possession.

APPEAL under the Letters Patent against a decision of Mr. Justice MITTER, in appeal from an Appellate Decree (No. 2568 of 1878) of the Officiating Judicial Commissioner of Chota Nagpore, reversing the decree of the Moonsiff of Raghunathpore.

Baboo *Bama Churn Banerjee*, for the Appellant.
Baboo *Pran Nath Pundit*, for the Respondent.

The facts of the case sufficiently appear from the following judgment of the High Court (1), which was delivered by

GARTH, *C.J.*:— GARTH, *C.J.*

We think that this case ought to go back for a retrial.

The Judicial Commissioner seems to have based his judgment

(1) GARTH, *C.J.*, and MCDONELL, *J.J.*

1879

RAM BANDHU v. KUSU BHATTU.

Judgment.

GARTH, *C.J.*

upon some grounds which, in our opinion, are manifestly erroneous.

The question in the case was, whether the property in suit is part of the plaintiff's village of Kada Mara, or part of Chuck Ansole which belongs to the defendants; and the Judicial Commissioner finds this question in the plaintiff's favor, firstly upon this ground. He argues that, because the southern boundary of the property in question, as described in the plaint, corresponds with the southern boundary of the village of Kada Mara as described by the father of the defendants Nos. 1 and 2 some years ago in a plaint in another suit, that serves to identify the property in question as being part of Kada Mara.

Now, if Chuck Ansole were situate outside the limits of the village of Kada Mara, there might be some force in this argument; but the defendant's contention is, that Chuck Ansole is *within* the ambit of the boundaries of Kada Mara, although it forms no part of the plaintiff's village; and the Judicial Commissioner has apparently mistaken the meaning of the defendant's pleader, when he said that Chuck Ansole *formed no part* of Kada Mara.

It is of course impossible to say how much weight the Judicial Commissioner may have attributed to this (apparently mistaken) argument.

It is obvious that the point made by the defendants, that Chuck Ansole was within the ambit of the limits of Kada Mara, was dealt with by the Moonsiff, and in the evidence; but it appears, so far as we can see, to have entirely escaped the notice of the Judicial Commissioner.

Then there is another very important point in the case, with regard to which the Judicial Commissioner seems to have proceeded upon a somewhat erroneous view of the law.

He says, that where there is any doubt as to the question of possession of jungle land, the case should be decided in favor of the person who has proved title.

Now we are quite aware of the high authority of the judgment from which the Deputy Commissioner takes his view of the law; but the passage to which he alludes must be read with the context, in order to be properly understood; and the rule which is

here laid down always requires to be applied with much care and aution.

The cases referred to are reported in the 23 W. R., 368, nd in 3 W. R., 78; and there are others, which have been ince decided in this Court, which explain the rule with sufficient learness.

As long as reliable evidence of acts of ownership is forthcoming, ere is no difference between the proof of possession in the case *jungle* or uncultivated lands, and that in the case of *cultivated* nds, and such proof is oftentimes forthcoming, as in the tting down of trees, or grazing of cattle, or putting up undary marks, or fences, and the like.

But it does sometimes happen, that neither party to a suit has ercised any acts of ownership at all over the land in question hich are capable of proof; and then in the doubt created by ch absence of proof, or of reliable proof, the Court is obliged resort to evidence of title, and to presume that the party who as the title, has also the possession. But in the present case here would seem to be evidence of at least some acts of ownership; and if so, it would be right for the Court to decide the ase upon that evidence, so far as the question of possession is oncerned, without resorting to the proof of title.

We have adverted particularly to these points upon which we hink that the lower Appellate Court has dealt with the case roneously; but we desire to leave the whole question open in ther respects, in order that a new trial may be fully and fairly ad between the parties. The costs will abide the result.

[CIVIL APPELLATE JURISDICTION]

1879 *Dec.* 2*nd.*

No. 142 of 1879.

KALLY CHURN DUTT AND OTHERS . . . APPELLANTS;

AND

PROTAB CHUNDER GHOSE . . . . . RESPONDENT.

Act VIII (B.C.) of 1869, *sections* 38 *and* 39—*Procedure—Appeal.*

There is no appeal against an order made by the Civil Court, under section 38 of Act VIII (B. C.) of 1869, directing the measurement of lands. *Crowdy* vs. *Goburdhun Roy*, 22 W. R. 491, followed.

Goluck Kishore Acharjee vs. *Kesha Majhee*, 15 W. R., 23; and *Munoo Dassee* vs. *Ishan Chunder Banerjee*, ib., 245, cited.

APPEAL from an order of the First Subordinate Judge of the 24-Pergunnahs.

The proceedings in this case arose out of an application, made under section 38 of the Rent Law, by one Protab Chunder Ghose for the measurement of a revenue-paying estate purchased by him, in June 1877, at a sale for arrears of Government revenue. The application was made on the 5th December 1878, and on that day the statement of the Naib in charge of the estate was taken down, and on the 10th an order for measurement was issued.

Some of the tenants then came in and stated that Protab Chunder Ghose had no right to claim measurement under section 38, and asked for an investigation to be made, and pending such investigation that the measurement should be stopped.

On the 13th March, Protab Chunder was examined, and an order was made in which the Judge declined at that stage to stay the measurement, as he was of opinion that the application for measurement was *boná fide* for the ascertainment of the lands purchased. It was, however, directed that the case of the objectors should be gone into on the 27th, and that the final order in the matter should be made thereupon.

It appeared from the evidence of Protab Chunder and his Naib that all attempts to obtain the collection papers from the former owners of the estate had been in vain, and that the tenants

1879

KALLY CHURN DUTT v. PROTAB CHUNDER GHOSE.

Judgment.

iemselves had refused to show the sites of their respective oldings. The only person examined by the objectors was Protab hunder's Naib, who had already been examined, but the evi- ince elicited by them merely corroborated what had already been ated on the other side.

In the end, the Subordinate Judge, on the 31st March 1879, rected that the measurement should proceed.

The objectors appealed on the ground that under section 38 Court had no power to direct the measurement of the lands question.

Baboo *Rash Behary Ghose*, Baboo *Byddo Nath Dutt*, and boo *Bhobany Churn Dutt*, for the Appellants.

Phillips, Baboo *Gooroo Dass Banerjee*, and Baboo *Saroda Churn itter*, for the Respondent.

The arguments of counsel and pleaders sufficiently appear m the following judgment of the Court (1), which was delivered

ICKSON, *J.*:— JACKSON, *J.*

The appellant in this case is met at the threshold by the gument of Mr. Phillips that in that stage of the proceedings, yond which they have not proceeded, there is no appeal. Under terms of section 38 of Act VII (B.C.) of 1869, it appears at the proprietor, here being unable to measure the lands mprised within his estate, had applied to the Court, and the urt thereupon ordered such lands to be measured. We find doubt an expression of opinion by the late Mr. Justice PHINSTONE JACKSON in two cases in 15 W. R., that upon such lication the Court should enquire and hear the evidence as whether the state of things described in section 38 really ted. Whether that be so or not, we are inclined to agree the only authority directly bearing upon the point, viz., ision of Mr. Justice PHEAR to be found in 22 W. R., 491 *owdy* vs. *Goburdhun Roy*, in which it was held that this of the proceedings is *ex-parte*, and consequently one in

(1) JACKSON and TOTTENHAM, *J.J.*

1879

KALLY CHURN DUTT v. PROTAB CHUNDER GHOSE.

Judgment.

JACKSON, J.

which, as the Court observes, "no proceeding in the shape of a suit or appeal can find place." Certainly there is nothing in the terms of section 38 to indicate that an appeal should be allowed from the order of the Court directing the land to be measured; on the contrary the only appeal that appears to be allowed by section 39 is where the Collector has completed his measurement and record, and *then* it is said, "every decision of the Collector made in pursuance of the provisions of section 38 shall be appealable." Baboo Rash Behary Ghose suggests that this order of the Court under section 38 comes within the definition of "decree." It seems to us clear that it does not; because there is no adjudication, there being no parties before the Court nor was there any right claimed by way of litigation, as we would say, or defence set up, nor can it be said that there was any adjudication or decision which decided a suit or appeal. The whole effect of the order made under that section is to set the Collector in motion, and to give rise to measurements and enquiries in the course of which, no doubt, the Collector might come to a decision which might afterwards be appealed against. We think this appeal should be dismissed with costs.

[ORIGINAL CIVIL JURISDICTION.]

'. F. BROWN . . . . . PLAINTIFF;

AND

). M. CUTTS AND ANOTHER . . . . . DEFENDANT.

1879
Nov. 18*th.*

No. 27 of 1879.

Civil Procedure Code (Act X of 1877*), section* 44, *Rule* (a)—*Suit for specific performance of Contract to sell land—Suit for recovery of immoveable property—Joinder of causes of action—Contract, Admissibility of Parol Evidence to vary written—Evidence.*

In a suit for specific performance of a contract to sell a share in a house and premises the plaintiff also sought to recover a sum of money due from the defendant on promissory notes.

Held, that the suit was not a "suit for the recovery of immoveable property or for declaration of title to immoveable property" within the meaning of section 44, Rule (a) of the Civil Procedure Code, and that the cause of action in respect of the promissory notes, which had been joined without the leave of the Court, was not improperly joined.

Delhi and London Bank vs. *Wordie*, I. L. R., 1 Cal., 249, cited and commented on,

Where the plaint, in a suit for specific performance of a contract to sell a certain share of a house, set out a written contract, and alleged that, on its having been subsequently discovered that the share was less than it was originally believed to be, the price was reduced by verbal agreement, *held*, that the written contract must be taken as intact save as to the price, and that no evidence could be given by the defendants in contradiction of the other terms of the document.

Daemoodie Paik vs. *Kaim Faridar*, 4 C. L. R., 419, followed.

Per WILSON, *J.*—Under section 44, Rule (a), of the Code of Civil Procedure, a suit for the recovery of immoveable property, &c., is a suit founded upon an existing title in which the plaintiff seeks to get possession of the property. The words "to obtain a declaration of title" apply to a case where a title exists, and the plaintiff seeks to have that fact declared.

HIS was a suit for specific performance of a written agreeit entered into between the plaintiff and the defendants, reby the defendants agreed to sell, "on certain terms and ditions as agreed upon," to the plaintiff their share which was ed to be one-third in a house and premises, No. 6, Emambagh

1879

BROWN v. CUTTS.

Argument.

2nd Lane, for Rs. 6,200, and also to recover Rs. 3,000, on three several promissory notes with interest.

The house in question was formerly the property of the late W. J. Bampton, and under his will was devised to his son and his three daughters (one of whom was the 2nd defendant in this suit) as a residence, but with a direction that if they should agree to sell it, the purchase-money should be divided equally.

On the 20th January 1873, the son sold and conveyed his quarter share to the trustees of the marriage settlements of the three daughters, the trustees in the case of each settlement being the same.

When the agreement was executed the defendants, one of the daughters of W. J. Bampton and her husband, represented that the entire house belonged to the three sisters, and it was not until after the agreement was executed that, on the will of the testator being submitted to the plaintiff, the conveyance to the trustees was discovered, and it appeared that the defendants had a right to sell a quarter share only.

A verbal contract was thereupon entered into, whereby the defendants agreed to sell their share in the house for Rs. 5,000, instead of Rs. 6,200, the sum stipulated for in the original written contract.

The plaintiff had paid to the defendants some portion of the purchase-money, and was willing to pay the balance on the defendants making over possession, and executing a conveyance of their one-fourth share in the house.

Phillips and *Trevelyan*, for the Plaintiff.

Branson and *Bonnerjee*, for the Defendants.

Bonnerjee.—No leave has been obtained under section 44, Rule (a) of the Civil Procedure Code to join the cause of action in respect of the promissory notes in this suit, which is really a suit for land. The suit therefore cannot proceed—*Pilcher* vs. *Hine*, 24 W. R. (Eng.), 619.

The case of the *Delhi and London Bank* vs. *Wordie*, I. L. R., 1 Cal., 249, is an authority for saying that a suit for specific performance of an agreement in regard to land is a suit for land within the meaning of the Letters Patent.

1879

BROWN v. CUTTS.

Judgment.

[WILSON, *J.*—The words in section 44 are "for the recovery immoveable property." Could you call a suit to compel istration a suit for the recovery of land?]

No, because the title passes by the conveyance.

[*Phillips* called attention to section 49 of the Registration t, III of 1877, as showing that without registration the con- ance has no effect.]

Then, such a suit would be a suit for the recovery of land. ontend that every suit in which the assistance of the Court is ight in order to obtain a transfer of immoveable property m another is a suit for the recovery of land. Thus, a suit a mortgagee for sale of the mortgaged premises is a suit land.

[WILSON, *J.*—But a mortgagee actually claims the land.]

Here the effect of granting specific performance will be to nsfer the property. The real object of the suit is to obtain a laration of title, or to have a title perfected.

As to the question of evidence, the suit is based upon a parol ntract. I am, therefore, entitled to give evidence as to what real agreement was.

Assuming, however, that the suit is upon the written agree- nt, it appears from the document itself that the agreement s to sell on "certain terms and conditions as agreed upon," I I am entitled to give evidence of what these conditions and ms were.

The Counsel for the plaintiff was not called upon.

The following judgment was delivered by

LSON, *J.*:— WILSON, *J.*

As between the plaintiff and Mr. Bonnerjee's client it appears me that no issue of fact has to be decided.

The suit is for the specific performance of a contract for sale land.

The objections are two-fold. The first is an objection to pro- ure; the other goes to the substance of the suit.

is said the suit cannot be entertained in its present form reason of section 44, Rule (a) of the Civil Procedure Code.

1879

BROWN v. CUTTS.

Judgment.

WILSON, J.

That section says: "No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, or to obtain a declaration of title to immoveable property, except, (*a*), claims in respect of mesne profits or arrears of rent in respect of the property claimed; (*b*), damages for breach of any contract under which the property or any part thereof is held; and, (*c*), claims by a mortgagee to enforce any of his remedies under the mortgage."

Mr. Bonnerjee has cited the case of the *Delhi and London Bank* vs. *Wordie*, I. L. R., 1 Cal., 249, which probably would be sufficient to justify him in saying that this is a suit for land within the meaning of the words of the Charter. The terms of the section, however, are narrower. It seems to me that a suit for the recovery of immoveable property is a suit founded upon an existing title in which the plaintiff seeks to get possession of the property itself. The words "to obtain a declaration of title to immoveable property" seem to me to apply to a case where a title exists, and the plaintiff asks to have that fact declared, not to a case where he seeks to have something done which, when done, will give him a title.

I think the first objection of the defendant fails.

If it were otherwise, I think there would be power under section 53 to amend the plaint by striking out the part which is not properly joined.

The other ground of defence goes to the substance of the case.

The defendant says, the contract alleged by the plaintiff was not the real contract; but that there were other terms which had to be fulfilled before he could obtain specific performance.

The plaint sets up a written contract for sale of a share in the premises in question, the parties assuming that the share of the female defendant was a one-third share. Accordingly the contract was for sale of a one-third share. The plaint (para. 3) says:—"It being subsequently discovered that the defendants had only a one-fourth share in the said house, a verbal agreement was by consent of the plaintiff and defendants entered into, whereby the defendants agreed to sell their share in the said house and premises to the plaintiff for Rs. 5,000."

1879

BROWN v. CUTTS.

Judgment.

WILSON, J.

I think the true meaning of that paragraph is, that the written agreement for sale of the one-third share continued intact, except that when the mistake was discovered the written agreement was varied, by one-fourth being sold instead of one-third, and the price being Rs. 5,000 instead of the larger sum. And that is the view taken by the defendants themselves in their written statement.

Then we have to look to the written document to see what the original contract was. That must be determined on the words of the document itself. The written document seems to me to be a complete contract of sale. Mr. Bonnerjee has called attention to the words "under certain terms and conditions as agreed upon." But those words do not, in my opinion, refer to anything outside the document, but to terms therein contained. They are an indication that there are conditions which are to be attended to, and the latter part of the deed sets out those terms. It would be entirely contradictory of the document if evidence were now to be given that the contract was subject to terms or conditions not set out in the document.

The case referred to in 4 Calcutta Law Reports, page 419—*Kaimoddee Paik* vs. *Kaim Faridar*—seems to be an authority that evidence cannot be given to vary what in a case like this is expressed in the document, and I should have come to the same conclusion in the absence of such an authority.

Even if the evidence were given, it is by no means clear that the defendant has any defence to the action. It is by no means clear that the existence of such a term entitled the defendants to the covenant they suggest. A man may be entitled under a contract to have a thing done; but it does not of necessity follow that he is entitled to have a covenant about it inserted in a deed. As between the plaintiff and the first defendant no question of fact in my opinion arises.

[ORIGINAL CIVIL JURISDICTION.]

1880 *January 26th.*

No. 665 of 1879.

RUSSICK LOLL MUDDUCK . . . . . PLAINTIFF;

AND

LOKENATH KURMOKAR . . . . . DEFENDANT.

Landlord and Tenant—Hindus, Agreements between—Buildings erected by tenants—Contract Act (IX of 1871), section 1—21 Geo. III., c. 70, section 17.

A tenancy in Calcutta created by express contract is within the words "matters of contract and dealing between party and party within the *proviso* contained in section 17 of 21 Geo. III., c. 70, and, therefore, the rights of the parties in respect of such a tenancy are governed by Hindu Law.

THE plaintiff in this case sought to be allowed to remove certain buildings, or to obtain their estimated value. The buildings in question had been erected by himself or his predecessors in title upon certain lands of which he and his ancestors had been yearly tenants under an express agreement, and from which he had been ejected by the defendant, the present landlord.

He alleged that upwards of ninety years previously, the land in question had been leased to his ancestor, Muthoor Mohun Mudduck, on a yearly tenancy at a rental of Rs. 20-6 per annum for the express purpose of building a house thereon; that Muthoor Mohun Mudduck had, at his own expense, and with the consent and knowledge of the then proprietor, Ram Lukhun Chatterjee, erected a house on the land, and resided therein until his death, as a yearly tenant at the rent already mentioned; that Muthoor Mohun Mudduck, on his death, was succeeded by his adopted son Poran Chunder Mudduck, who also, at his own expense, with the consent and knowledge of the owner of the trust, built thereon another pucca brick house and a cutcha house with a tiled roof, and also certain other pucca out-houses, &c.; that he likewise converted two cutcha huts, erected by his adoptive father, into brick-built rooms with tiled roofs; that with the consent and knowledge of the owner he let a portion of these premises to

1880

RUSSICK LOLL MUDDUCK v. LOKENATH KURMOKAR.

Judgment.

tenants; that Poran Chunder Mudduck died, leaving the plaintiff and his two brothers, Behary Lall and Hurry Doss, him surviving. The first of these brothers died without issue leaving a widow, and the other died unmarried.

From the land and premises in question the plaintiff was ejected on the 30th November 1878, by the defendant who had purchased the land from the owners in April previous.

The plaintiff now claimed to be entitled to remove the materials of the houses built upon the land originally leased to Muthoor Mohun Mudduck, or to recover their value.

The defendant, who alleged that the plaintiff and his predecessors had permission only to erect kutcha huts, and that the erection of pucca building was a breach of an agreement entered into by them, contended that the plaintiff was not entitled to remove the materials or to receive compensation.

Bonnerjee, for the Plaintiff.

Mitter, for the Defendant.

The following judgment was delivered by

WILSON, *J.* :— WILSON, *J.*

This is a suit by an ejected tenant of land in Calcutta against his landlord, in which he claims to be entitled to remove buildings alleged to have been erected on the premises in question by him or his predecessors, or to be paid compensation in respect of them.

The case came on for settlement of issues on the 8th instant, and the issues were settled accordingly. The first issue is "by what law are the rights of the parties governed," *i.e.*, by Hindu law or English?

If the case is governed by English law, then it was admitted that the plaintiff's claim fails; if by Hindu law, then there remain other issues to be tried. This question was argued by Mr. Bonnerjee for the plaintiff and Mr. Mitter for the defendant, and I took time to consider my judgment.

It appears from the pleadings on both sides that the land in question is in Calcutta, and that the tenancy was one created by

1880

RUSSICK LOLL MUDDUCK v. LOKENATH KURMOKAR.

Judgment.

WILSON, J.

express contract. The parties concerned are, and throughout have been, Hindus. By what law are the incidents of such a tenancy governed?

The law generally to be applied by this Court within Calcutta is the common law of England, subject to exceptions, qualifications, and additions which it is unnecessary at present to notice. But by section 17 of 21 Geo. III, c. 70, it is provided that "inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentus by the laws and usages of Gentus."

If this proviso applies to the case, then, subject to the other issues remaining to be tried, the plaintiff is *primâ facie* entitled to remove the buildings erected upon the land or to receive compensation—*re Thakoor Chunder Paramanick*, B. L. R. (F. B. R.), 595.

The decided cases bearing upon the matter are not numerous. In *Doyal Chand Laha* vs. *Bhoyrub Nath Khettry*, Coryton, 117, PHEAR, *J.*, granted an injunction restraining the defendant, who had been in occupation of premises in Calcutta, from removing the materials of additional buildings which he said he had built; reserving leave to the defendant to bring a suit within two months to establish a special custom alleged by him which would authorise his act. In that case, however, the report does not show under what circumstances the defendant had been in occupation, whether as tenant, or if so to whom, or under some independent title. Unless he were tenant and tenant to the plaintiff or of some one to whose right the plaintiff succeeded, the decision in that case does not bear upon the present. Nor does the report show whether the learned Judge dealt with the case as one governed by English law, or by Hindu law. If by the latter, then the decision seems to be overruled by the later Full Bench case of *re Thakoor Chunder Paramanick*, B. L. R. (F. B. R.), 595.

The last mentioned case decided that according to Hindu law buildings do not become the property of the owner of the soil on which they are erected merely because they are so erected,

but that any one who has built on land which he occupies under any *bonâ fide* claim of title is entitled to remove the materials or be paid for them.

In *Parbutty Bewah* vs. *Woomatara Dabee*, 14 B. L. R., 201, the question was, whether the tenant of land in Calcutta on which he had erected tiled huts was entitled to remove them. A custom to remove such erections was proved, and MACPHERSON, *J.*, upheld the tenant's right to remove. But in that case it was not necessary to decide, nor does it decide, anything as to what the right of a tenant is apart from evidence of custom.

These are the only cases with which I am acquainted bearing at all directly upon the question now raised for decision, and none of them appear to me to decide the question.

In the absence of express authority, I am of opinion that a tenancy created by contract is within the words "matters of contract and dealing between party and party" in the proviso of section 17 of 21 Geo. III., c. 70.

The law, as laid down in the Full Bench case referred to, when applied to a contract of tenancy, is not inconsistent with anything in the Contract Act (IX of 1872), and therefore is unaffected by it: see section 1 of that Act.

Upon the first issue, therefore, I find that the rights of the parties are governed by the Hindu law, as laid down in the case just mentioned. The remaining issues will have to be tried.

[ORIGINAL CIVIL JURISDICTION.]

No 271 of 1879.

CHUNDRAMONEY DOSSEE . . . . . PLAINTIFF;

AND

MOTILAL MULLICK. . . . . DEFENDANT.

Will, Construction of—Void Residuary Bequests—Gifts to a Class—Religious Trusts—Trusts for Maintenance—Perpetuities.

A testator by his will directed as follows:—"To my daughter A. B. I give the interest on a Government promissory note for Rs. 3,000 to be paid to her, as the same becomes due, during her life, and if at her death there be any male issue of hers living, I give the said promissory note to be divided equally among them if more than one, and if there be no such male issue living at the death of the said A B, the said security for Rs. 3,000 shall, thereupon, fall into the general residue of my estate." He also directed, after having bequeathed five one-sixth shares of his estate to his younger sons, that "the remaining one-sixth share shall be retained by my executors, and the income thereof accumulated and invested in Government securities until the son or sons of my eldest son H, if he shall have any son, shall attain full age, and shall thereupon be paid to such son or sons, if more than one, in equal shares; * * * and in case no son be born of my said eldest son, or no son shall attain full age, then such one-sixth share shall, on the death of the said H, be divided equally among such of my five other sons as shall then be living and the male issue of such of them as shall then be dead, such male issue taking the share of their respective fathers."

Then, after reciting that he was desirous of making, out of his immoveable property, a permanent provision for the benefit of his five younger sons and their male descendants, and that he was desirous of having the due forms of worship carried out after his death, he further directed that certain lands should be held by his executors on trust to apply the rents and profits, (1) in the celebration of certain poojahs and in the performance of periodical turns of worship of the family Thakoors and other religious festivals, at the same expense and on the same style as the testator himself had done, or at such expense and in such style as the executors should think fit; and (2) in the maintenance, out of the surplus, of the five younger sons, their wives, sons and male descendants, and female descendants until their marriage.

Held, that the bequests to the children of the daughter and to the children of H were void.

1879

CHUNDRAMONEY DOSSEE v. MOTILAL MULLICK.

Statement.

Held, also, that the trust for maintenance and the religious trusts, as being mere perpetual trusts for the benefit of the family, were likewise void.

THIS suit was brought by the plaintiff as widow and heiress of Grish Chunder Mullick, the youngest son of Dwarka Nath Mullick, the testator, who died 14th August 1866, leaving him surviving the six sons and a daughter, and two grandsons.

By his will, three of the sons viz., the defendant Mutty Lall Mullick, Chunee Lall Mullick, and Ram Lall Mullick were appointed executors. The testator, after giving certain legacies, directed that the residue of his personal estate should be divided into six equal parts, and that five of such parts should be given to each of his five younger sons, and that the remaining one-sixth share should be retained by the executors and invested in Government securities until the son or sons of his eldest son, Hera Lall, should attain full age, when the same should be transferred to such son or sons, and equally divided among them, if more than one; that if no such son attained full age, then this one-sixth share of the residue should be divided among such of his others sons as should then be living, and the male issue of such of them as should be dead, such male issue to take the shares of their respective fathers.

Then, after reciting that he was desirous of making out of his immoveable property a permanent provision for the benefit of his five younger sons and their male descendants, and also that he was desirous of having the due forms of Hindu worship carried out after his death, the testator further directed that twelve parcels of land or houses set out in the will should be held by his executors in trusts to apply the rents and profits after the payment of taxes, etc., (1) in the celebration of the festivals of Doorgapoojah and Kalipoojah, and in the performance of periodical turns of worship of the family Thakoors and other religious festivals and ceremonies at the same expense, and in the same style as such festivals and ceremonies had been performed by the testator himself, or at such expense and in such style as the executors should think fit; and (2) in the maintenance, out of the surplus, of the five younger sons, their wives, sons and

1879

CHUNDRAMONEY DOSSEE v. MOTILAL MULLICK.

Statement.

male descendants, and female descendants up to marriage. He also directed that certain small sums should be paid out of this surplus, by way of maintenance, to his eldest son, Hera Lall.

To his daughter Doorgamoney Dossee the testator gave the interest on a Government security for Rs. 3,000 to be paid to her during her life, and at her death to her male issue equally if any should be then living. Should there be no such issue, it was directed that the security for Rs. 3,000 should fall into the residue of the estate. A similar bequest was made to his other daughters with similar provisos.

In 1869 Hera Lall instituted a suit in the High Court against the present defendants and the plaintiff's deceased husband, for a declaration that his father had no absolute disposing power over his entire estate to the exclusion of himself. He further alleged that he as eldest son was entitled to the estate; that the will was void; that if he were not entitled to the whole estate, a more adequate maintenance should be directed to be paid to him. On the 4th of January 1870, a decree was made in the suit, in which it was declared that the gifts of the interest on the Government securities to his daughters for life were valid, as also other gifts of immoveable property to living persons; that as to the one-sixth share of the residue of the personal estate which the executors were directed to accumulate for the sons of Hera Lall, the testator had died intestate, and that accordingly Hera Lall was entitled to an equal portion of such $\frac{1}{6}$th share with his brothers.

Subsequently, in 1870, another suit was instituted by Hera Lall, for maintenance and an account, but this suit was compromised by the payment to Hera Lall of the sum of Rs. 2,000 in full of all rights or demands under the will, up to the date of the decree which was made upon the compromise.

The plaintiff now prayed that the will might be construed, and the rights of all parties thereunder declared; that it might be declared that the bequest of the corpus of the legacies given to the testator's daughters was void; that the bequest of the one-sixth share of the residuary personal estate to the sons of Hera Lall, and the trusts created by the will in respect of the immoveable property, were also void; that the plaintiff as widow of her late husband was entitled to such shares as her husband should

be declared under the will to have been entitled to absolutely. Various accounts were also asked for.

The case came on for settlement of issues.

Bonnerjee and *Sale*, for the Plaintiff.

Phillips, for the Defendants.

Bonnerjee contended that as to the bequest of the Government securities to the male issue of the testator's daughters it was unnecessary to decide whether the will was valid or not, until the legatees themselves came before the Court for administration. The gift of one-sixth share of the personal residuary estate to the son of Hera Lall was invalid as a gift to a class. He referred to *Promotho Dossee* vs. *Radhika Persaud Dutt*, 14 B. L. R., 175; *Gurim Chand Paray* vs. *Brojonath Mundle*, No. 632 of 1873, unreported.)

The devise of the immoveable property was void as an attempt to create a perpetuity—*Krishnaramani Dasi* vs. *Ananda Krishna Bose*, 4 B. L. R., 231. The trust for the idol was void also, on the ground of vagueness—*Sandial* vs. *Maitland*, Fulton's Rep., 475; *Ibchunder Mullick* vs. *Treepoorah Soondry Dossee*, Fulton's Rep., 98.

The accounts required by the plaintiff would be obtained by the usual administration decree.

Phillips contended that as far as the will was concerned, the accounts would be joint family accounts, and not accounts to be rendered by the executors as such.

The devise of the immoveable property for the purposes of enshrining the idol was a good devise—*Dwarkanath Bysack* vs. *Burroda Persaud Bysack*, I. L. R., 4 Cal., 443; *Gobind Chunder Gosami* vs. *Rungomoney Dossee*, No. 326 of 1869 (unreported).

The Tagore case (9 B. L. R., 377) did not cover a trust for maintenance such as the testator has in this case created.

Bonnerjee in reply distinguished the case of *Dwarkanath Bysack* vs. *Burroda Persaud Bysack*, on the ground that there was no attempt to create a perpetuity.

1879

CHUNDRAMONEY DOSSEE v. MOTILAL MULLICK.

Judgment.

WILSON, *J.*

The following judgment was delivered by

WILSON, *J.* :—

This case came on for settlement of issues, when it appeared that the only questions in dispute were questions of law arising upon the will of Dwarkanath Mullick.

The testator died leaving six sons, Hera Lall, the eldest, and the defendants and Grish Chunder the younger son. The plaintiff is the widow and heiress of Grish Chunder, and as such she claims to be entitled to certain interests in the testator's property, and to accounts and partition.

Three parts of the will are in question.

The first question is as to certain gifts to the daughters of the testator, and after them to their heirs, in the following terms :— "To my second daughter, Sreemutty Doorgamoney Dossee, the wife of Baboo Cally Churn Coondoo, I give the interest on a Government 4 per cent. security for Rs. 3,000 to be paid to her as the same becomes due during her life, and if at her death there be any male issue of her's living, I give the said Government 4 per cent. security for Rs. 3,000 to such male issue to be equally divided among them if more than one, and if there be no such male issue living at the death of the said Sreemutty Doorgamoney Dossee, the said security for Rs. 3,000 shall thereupon fall into the general residue of my estate : To my third daughter, Sreemutty Kally Dossee, the wife of Baboo Kader Nauth Day, I give the interest on a Government 4 per cent. security for Rs. 3,000 to be paid to her as the same becomes due during her life, and if at her death there be any male issue of her's living, I give the said Government 4 per cent. security for Rs. 3,000 to such male issue to be equally divided among them if more than one, and if there be no such male issue living at the death of the said Sreemutty Kally Dossee, the said security for Rs. 3,000 shall thereupon fall into the general residue of my estate."

So far as the question can be determined between the parties to this suit the gifts over to the children of these ladies are, in my opinion, void, and the property bequeathed has fallen, after the deaths of the ladies, into the residue. But I cannot preclude

ıe children from coming in and claiming, and can only say what ıe rights of the parties are subject to any such claim.

The second question is as to a one-sixth share of the residue of ıe moveable estate. It is thus dealt with by the will :—

" The residue of my personal estate or moveable property, after ıaking the payments abovementioned, shall be divided into six ıual parts, and one of such equal parts shall be paid and trans-ɛrred to each of my five younger sons Mutty Lall Mullick, Chunee Lall Mullick, Ram Lall Mullick, Lattoo Lall Mullick and Irish Chunder Mullick, and the remaining one equal sixth part hall be retained by my executors, and the income thereof accu-ıulated and invested in Government securities until the son ır sons of my eldest son, Hera Lall Mullick, if he shall have any on, shall attain full age, and shall thereupon be paid and trans-erred to such son or sons if more than one in equal shares, but ıo such payments or transfer shall be made to such son or sons ıntil the youngest of them, if more than one, shall have attained ıis full age, and in case no son be born of my said eldest son, Hera Lall Mullick, or no son shall attain full age, then the last nentioned equal sixth-part of my residuary personal estate shall, ın the death of the said Hera Lall Mullick, be divided equally ımong such of my other five sons as shall then be living, and the nale issue of such of them as shall then be dead, the male issue aking the share of a deceased son. In case daughter or laughters be born of the said Hera Lall Mullick, such daughter or laughters shall receive from the income and profits of the said ixth part of my residuary estate, such maintenance up to their ıarriage as my said executors or trustees for the time being of hese presents shall deem proper for them, who shall also pay ·om the same sources the necessary expenses attending the cele-ration of the marriage of such daughter or daughters."

Again, so far as can be now decided between the present parties, ; seems clear that this bequest is void. But again I cannot pre-lude any of the children of Hera Lall from coming in and claim-ıg if they choose.

The third question is as to the immoveable property. It is ıas dealt with :—" And whereas I am desirous of making, out ' the immoveable property of which I am possessed, a permanent

1879

CHUNDRAMONEY DOSSEE v. MOTILAL MULLICK.

Judgment.

WILSON, *J.*

provision for the benefit of my said five younger sons, s descendants in the male line, and also for the descendan male line of my said eldest son, and I am also desirous out after my death the due forms of worship prescribe Hindu religion. Now, therefore, I do hereby devise a unto and to the use of my said three younger sons M Mullick, Chunee Lall Mullick, and Ram Lall Mullick th executors and administrators :—*Firstly.*—All that ho premises No. 85, Cotton Street, consisting of pucka with lands measuring about five cottahs and thirty- *Secondly.*—All that piece of land and premises, No. 72, Road, with one-storied godowns and land measuring a cottah and six chittacks. *Thirdly.*—All that piece of l premises No. 87, Monohur Doss's Street, consisting godowns and land measuring about seven chittacks and tl feet. *Fourthly.*—All that piece of land and premise Cross Street, consisting of pucka one and two-storied b and of land measuring one cottah nine chittacks and th *Fifthly.*—All that undivided moiety or half share in all tl of land and premises, Nos. 13, 14, 15, 16 and 17, Kho Street, consisting of pucka buildings and land measuri five cottahs, and the other moiety belonging to the heirs narain Mullick. *Sixthly.*—All that piece of land and p No. 107, Durmahattah Street in Hatkholah, Sootanooty, c of pucka three-storied buildings standing upon land m two cottahs and one quarter chittacks, less than one *Seventhly.*—All that piece of land and premises, No. 60, Road, Barranossy Ghose's Street, consisting of pucka b with land measuring about two cottahs four chittacks and two feet. *Eighthly.*—All that piece of land and premises Barranossy Ghose's Street, consisting of pucka buildi land measuring about eighteen cottahs or thereabouts. *N* All that piece of land and premises No. 1½, Cossitolla consisting of two-storied house and land measuring cottahs or thereabouts. *Tenthly.*—All that one-fourth share in land and premises, No. 103, Cotton Street, land one cottah and thirty-six feet. *Eleventhly.*—A fourth undivided share in land and premises, Nos.

Street, containing about seven chittacks and five feet. '.—All that one-fourth undivided share in house and , No. 71, Lower Chitpore Road, which was formerly used int family dwelling house, containing land about eighteen five chittacks and twenty-eight feet. *Lastly.*—All that ouse and land at Taleetollah, Dum-Dum, in Shamnuggur, :e, containing land, of which four biggas are rent-paying remaining portion of the land is rent-free, about 22 nore or less appertaining to the talook now belonging to :e Buzlool Rohim, and all the rights, easement, and appur- thereto belonging upon trust; that the said Mutty Lall Chunee Lall Mullick, and Ram Lall Mullick shall let the)m time to time for the best rent that can be obtained, l apply the rent issues and profits of the said heredita- id premises first in payment of all rates, taxes, and out- xpenses of collections of rents, repairs, improvements, and :essary costs of management, and next in the celebration stival of the Doorgapoojah and Kallypoojah, and in the nce of the periodical turn of worship of my family idol ı Thakoor, and other religious festivals and ceremonies xpense and on a style I have hitherto done, or at an as the said Mutty Lall Mullick, Chunee Lall Mullick, ı Lall Mullick or other the trustees or trustee for the ıg of these presents shall think fit.

hereby declare that the said Mutty Lall Mullick, Chunee llick, and Ram Lall Mullick, or other the trustee or for the time being of this my will shall stand possessed ırplus of the rent issues and profits of the hereditaments ıises hereinbefore mentioned after making the payments . In trust to lay out and expend such surplus in main- of my said five sons Mutty Lall Mullick, Chunee Lall Ram Lall Mullick, Lattoo Lall Mullick, and Grish Mullick, their respective wives, sons, male descendants ıle descendants up to their marriage."

this it seems to me that no part of the trust can be l. The recital shows the object to be to establish a it endowment for the testator's descendants. The trust e maintenance is undisputably void. The so-called

k.

1879

CHUNDRAMONEY DOSSEE v. MOTILAL MULLICK.

Judgment.

WILSON, J.

religious trusts are, I think, only trusts for their worship, not gifts to idols, or to charity, but mere perpetual trusts for the family, and therefore void.

It follows that subject to the possible claims I have referred to, the several properties mentioned are undisposed of by the will, and fall into the residue.

Primâ facie it would seem that each of the six sons of the testator, and therefore the plaintiff, as widow of one of them, is entitled to one-sixth of the residue.

Facts are set out in the plaint to show that Hera Lall has lost his right to any share, and that the parties to this suit are entitled alone to divide the residue. That seems to be so, though I cannot say it is beyond doubt, and at all events I cannot decide the question as against Hera Lall in his absence. All I can say is, that subject to any claim of Hera Lall to a share of the residue the plaintiff and the defendants are entitled to it equally, the plaintiff for a Hindu widow's estate.

The plaintiff is, I think, entitled to accounts as prayed—the defendants, the executors, accounting as such as between themselves and the joint estate, and the accounts as between the plaintiff and the family being taken as family accounts. A partition will be made as prayed.

An enquiry must be made as to how Hera Lall's annuity should be secured.

Costs will follow the ordinary rule in partition suits.

[ORIGINAL CIVIL JURISDICTION.]

LI CHURN SHAW AND ANOTHER . . . PLAINTIFFS; 1879 *Dec.* 10*th.*

AND

KHY BEBEE AND ANOTHER . . . . . DEFENDANTS. No. 327 of 1879

ai Marriage—Hulwe Caste—Limitation Act, XV of 1877, *Schedule II, Arts.* 89, 90, 120 *and* 144.

In the Halwe caste a valid Sagai marriage may be contracted with a widow, where there is a wife already living, provided that wife be childless.

HIS was a suit brought by the sons of one Doorga Shaw by defendant Poorno Massy, to recover possession of the pro- ty left by their deceased father.

)oorga Churn Shaw died in 1857, possessed of considerable reable and immoveable property. He belonged to the Hulwé e, and it was alleged that according to a custom prevailing in t caste he had married, according to the Sagai form of rriage, the defendant Poorno Massy, the widow of one Goury ıker, and that the plaintiffs were the children born of this riage.

ıt the time of this alleged marriage Doorga Shaw had a wife, living, the defendant Dukhy Bebee, but he had no children ıer.

n the husband's death the property was allowed to remain in hands of Dukhy Bebee, but she continued to live with rno and her sons in the family dwelling house until 1865, n disputes arose, and a suit was instituted by Poorno, who ned a moiety of the estate of Doorga Churn, under an alleged made by him.

his suit was compromised and an agreement come to, under h Dukhy was to retain the management of the property, and o was to receive Rs. 15 per mensem for her maintenance, be allowed to live in the family house as long as the rty was in the hands of the former.

1879

KALI CHURN SHAW v. DUKHY BEBEE.

Argument.

In Aughran 1284 B.S., corresponding with December 1877, the plaintiffs who were infants at the time of their father's death, were put in charge of a sweetmeat shop by Dukhy Bebee in one of the rooms in the family house.

In February 1879, however, Dukhy Bebee, on being called upon by the plaintiffs to make over their father's estate to them and to render an account of her dealings therewith, filed a suit against them for recovery of the sweetmeat shop and of the portion of the dwelling house occupied by the plaintiffs, and for the rent from Aughran 1284.

It was proved that it was the custom in the Hulwé caste for marriages to be contracted in the Sagai form, and that widows might so be taken in marriage.

Evidence was also given to show that the plaintiffs' mother had been married in this form, and that the children of the marriage had been recognised as legitimate.

Bonnerjee and *T. A. Apcar*, for the Plaintiffs.

Kennedy and *Sale*, for the Defendant Dukhy Bebee. No one appeared for Poorno Massy.

T. A. Apcar.—In the Hulwé caste to which the plaintiffs' father belonged, the Sagai form of marriage is recognised. The marriage alleged in this case was celebrated in that form, and according to Menu, Bk. III, section 35, it is a valid marriage—See *Gutha Ram Mistree* vs. *Moohita Kochin Attea Doomoonee*, 14 B. L. R., 289; and Mayne's Hindu Law, p. 79.

In the case of *Rajkumar Nobodip Chundro Deb Burmun* vs. *Rajah Bir Chunder Manikya*, 25 W. R., 404, a very simple form of marriage, which was proved to be customary among a particular class, was recognised by the Court. (See p. 414.)

The Sagai form of marriage was recognised as valid in the case of *Bissuram Koiree* vs. *Empress*, 4 C. L. R., 410.

(The case of *Narain Dhara* vs. *Rakhal Gain*, I. L. R. 1 Cal., 1, and Act XV of 1865 were also referred to.)

Kennedy contended that there was no sufficient proof that the necessary ceremonies constituting the *Sagai* form of marriage had taken place. He further contended that the suit was barred

by limitation, inasmuch as in the suit brought by Poorno in 1865, there was an absolute assertion of adverse title by Dukhy, and that suit had been compromised by her title being recognized, and the whole of Doorga Churn Shaw's property being made over to her.

1879

KALI CHURN SHAW v. DUKHY BEBEE.

Judgment.

The following judgment was delivered by

WILSON, *J.*:— WILSON, *J.*

The plaintiffs in this case sue as the heirs of one Doorga Churn Shaw by a Sagai marriage. The question to be determined is, whether under the circumstances the Sagai marriage alleged to have been contracted was valid.

The Sagai form of marriage is not unknown to these Courts; it is referred to in a case reported in 3 C. L. R., 410—*Bissuram Koiree* vs. *Empress*. There is overwhelming evidence, too, that marriages in this particular form are common in the class to which Doorga Shaw has been shewn to have belonged. It has been proved that among men of that class widows may be taken in marriage; that such marriages are completed by the payment of fines; and that a valid Sagai marriage may take place where there is already a wife living, provided that wife be childless. Some of the witnesses also stated that a married woman might contract a Sagai marriage if a punchayet had determined that her first husband was unable to support her. As to such a marriage by a married woman I need say nothing. But I see no objection, on principle, to Sagai marriages with widows, and I think that the custom under which such marriages are allowed is a good custom.

The question then is, whether Doorga Shaw contracted such a marriage.

It appeared that he was a childless husband, and had for some time contemplated such a marriage, and that he had every motive to contract such a marriage. It was proved that the alleged wife Poorno was present at his death, that subsequently the caste people and Dukhy herself treated the plaintiffs as legitimate children. Another strong circumstance is, that when Dukhy went to Benares to celebrate a feast she took one of the

1879

KALI CHURN SHAW v. DUKHY BEBEE.

Judgment.

WILSON J.

sons of Poorno with her. I hold, therefore, that Doorga was married to Poorno according to the Sagai form, and that the marriage was valid.

The next question is whether the suit is barred by limitation.

The facts are that Doorga Churn died in 1857 leaving him surviving two widows—Dukhy and Poorno Massy. It is natural that the property should have remained in the hands of the elder widow. The two widows and the sons of the younger widow lived together amicably up to 1865, when a suit was brought by Poorno setting up a will under which she claimed as a joint residuary legatee with Dukhy. That suit was compromised, and an agreement was entered into, by which Dukhy was to pay Rs. 15 per mensem to the other widow for her support and maintenance, and to allow her to live in one of the apartments in the dwelling house.

From the time of that compromise I am satisfied that the property remained under the management of Dukhy for the benefit and with the consent of all parties. Under all the circumstances it seems to me that limitation runs only from the month of Aughran 1284, corresponding with November 1877 when Dukhy first, as I hold, adversely claimed the whole property left by Doorga Shaw by a suit against the plaintiffs for rent from that date for the portion of the house held by them.

I do not think the case falls under Act 123 of the Limitation Act (XV of 1877), and for this reason that the plaintiff's claim is not for a legacy or distributive share of an estate. The suit is to recover certain property which they claim absolutely, though it, in fact, came to them as a distributive share. As to the immoveable property claimed, I think the suit is governed by Art. 144 of the Limitation Act, while as to the moveables, Art. 89 or 90, or else Art. 120, which provides for such suits as are not otherwise provided for elsewhere, is applicable.

I am of opinion, therefore, that the plaintiffs are entitled to a decree declaring them entitled to the whole estate as it was in the hands of Dukhy in the month of Aughran 1284, and to an account of all money or property received by her since that time.

[ORIGINAL CIVIL JURISDICTION.]

HAMKISSORE MUNDLE . . . . . PLAINTIFF;

AND

HOSHEEBHOOSUN BISWAS . . . . . DEFENDANT,

1880 *January 29th.*

No. 253 of 1879.

Interrogatories, Application to strike out—Practice—Civil Procedure Code, (Act X of 1877), sections 121, 125, 127 and 136—Rules of Court.

If interrogatories administered in a suit are scandalous, the Court may interfere by striking them out at any stage of the suit.

In other cases, where the party interrogated objects to the interrogatories administered, he may omit to answer them at his peril, and in that case it is open to the opposite party to apply to the Court under section 127 for an order requiring him to answer the interrogatories either by affidavit, or by *viva voce* examination as the Court may direct.

Where the questions are such as need not be answered under section 125, the party to whom they are administered may file an affidavit objecting to answer them.

In granting leave to a party to interrogate the opposite party, the Court has only to determine whether the case is a proper case for interrogatories and not what questions the party interrogated may be compelled to answer.

THIS was an application on the part of the defendant that rder of the Court, allowing certain interrogatories to be adminis- red by the plaintiff for the examination of the defendant should e recalled, on the ground that the interrogatories which had en administered were really for the cross-examination of the fendant upon matter in no way common to the case of both rties.

The suit was instituted in April 1879, under Chapter XXXIX the Civil Procedure Code, against one Greender Bhoosun was, who had since died, for the recovery of Rs. 6,000 on a missory note, payable three months after date, purporting to e been signed by him on the 2nd December 1878, at Calcutta. On his death the suit was revived against Shosheebhoosun Bis- as his executor. On the 24th July, Shosheebhoosun applied

1880

SHAMKISSORE MUNDLE v. SHOSHEE-BHOOSUN BISWAS.

Judgment.

for, and obtained leave to defend the suit, and on the 11th of August filed his written statement, wherein he alleged that it was wholly untrue that Greender Bhoosun Biswas had ever executed any promissory note in favour of the plaintiff for Rs. 6,000, or for any other sum.

O'Kinealy, for the Plaintiff.

Bonnerjee, for the Defendant.

Bonnerjee.—The order was an *ex-parte* order made in Chambers. We have a right, therefore, to apply in Court to have it reconsidered, and if it be found to have been wrongly granted, to have it set aside.

We object to the interrogatories administered on the ground that they are merely for the cross-examination of the defendant upon his written statement, and ask that they may be struck out as improper.

[WILSON, *J.*—Under the new system it has been the practice to discourage any objection being taken as to the admissibility of interrogatories, on the interrogatories themselves. Such objections are generally taken upon the answers. It is only where the interrogatories are scandalous that you may take objection on the interrogatories.]

There is nothing, however, in the Code which bars this application.

O'Kinealy submitted that the application was irregular. The proper course for the defendant was to make an affidavit under section 125, and of this they were well aware, as they had in fact put in such an affidavit in which the only objection taken to the questions was that they related to matters of cross-examination only. That is clearly an insufficient ground, as it admits that the questions are relevant.

[WILSON, *J.*—I cannot go into the merits now.]

Having filed their affidavit under section 125, they have nothing more to do until we come in under section 127. This application is out of place.

WILSON, *J.* WILSON, *J.*:—

There is no doubt that the practice should be settled, because

1880

SHAMKISSORE MUNDLE v. SHOSHEE-BHOOSUN BISWAS.

Judgment.

WILSON, J.

the procedure is new, and it is very important that there should be a settled practice. I do not entertain any doubt as to what practice is most convenient and most in accordance with the Civil Procedure Code.

The first section of the Code which deals with interrogatories is section 121, which says :—"Any party may at any time, by leave of the Court, deliver through the Court interrogatories in writing for the examination of the opposite party." Now what that section contemplates is, I think, (1) leave to interrogate, and (2) the service of the interrogatories through the Court.

Following on that section we have a rule of Court which makes the matter a little more clear. That rule is as follows :—"When interrogatories are ordered by the Court to be delivered under section 121 of the Code of Civil Procedure, two copies of each set of interrogatories shall be tendered to the Registrar, who, when the same are tendered by the plaintiff, shall forthwith, or when the same are tendered by the defendant, shall, on being satisfied that the defendant has filed a written statement, retain and file one of such copies and deliver the other copy for service to the attorney of the party tendering the interrogatories, or if there be no attorney, to the sheriff after adding at foot thereof his signature and official designation. "Let this be served by the plaintiff's attorney [*or* the defendant's attorney, *or* the sheriff, as the case may be.]" Rule 274, Belchamber's Rules and Orders, p. 152.

Now I think that the section and the rule together clearly contemplate that it is the duty of the Court to determine whether the applicant should be allowed to interrogate the other side, but not to determine at that stage what questions the party to be interrogated should be compelled to answer.

In the present case that procedure seems to have been followed. Leave to interrogate was granted to the plaintiff. The order was, that "the plaintiff be allowed to interrogate."

In future, I think, these applications should be made in Chambers on Petition like other applications, and the order would be, that the applicant be at liberty to interrogate.

I think Mr. Bonnerjee is right when he says that the order stands on the same footing as any other order made in Chambers

1880

SHAMKISSORE MUNDLE v. SHOSHEE-BHOOSUN BISWAS.

Judgment.

WILSON, *J.*

on *ex-parte* applications, and that the parties have a right to come into Court and ask that the order be reconsidered, and, if found to have been wrong, set aside. Therefore, if an order is made giving leave to interrogate, the party ordered to answer has a right to come into Court to have the order set aside if the case is one in which interrogatories ought not to have been allowed.

If the order was not wrong, and the case was a proper one for the administration of interrogatories, then other courses are open to a party objecting to the interrogatories administered. If the interrogatories are scandalous, or in any way an abuse of the process of the Court, the Court no doubt may interfere at any stage. In other cases the party interrogated might omit to answer the interrogatories to which he objects at his peril. Then the course is for the interrogating party to apply to the Court under section 127 for an order requiring the other party to answer, or answer further, either by affidavit or by *viva voce* examination, as the Judge may direct.

Or the party interrogated may take a more cautious course; he may file his affidavit in answer, stating in it his objections to answer such questions as he objects to: and in this case the interrogating party if dissatisfied can apply under section 127.

Section 36 has been referred to, but I have no doubt the Court will not exercise the powers there given except in extreme cases.

It follows that in my judgment the proper course is, that if the defendant in this case desires to object to any of the interrogatories, he may abstain from answering or state his objection in his affidavit. If he does so object, then the plaintiff may take steps under section 127 to compel him to answer. The present application to disallow the questions is in my opinion wrong.

[CIVIL APPELLATE JURISDICTION.]

1879.
December 12th.

No. 180 of 1879

PARBUTTY CHURN SEN AND OTHERS (DECREE-HOLDERS) . . . . . APPELLANTS;

AND

SHAIKH MANDARI (JUDGMENT-DEBTOR) . RESPONDENT.

Appeal—Act VIII (B.C.) of 1869, section 52, Suit under—Suit for arrears of rent and ejectment of tenant—Act VIII (B.C.) of 1869, section 102—Jurisdiction—Execution proceedings.

Where a suit is brought under section 52 of the Rent Law, Act VIII (B.C.) of 1869, for the recovery of arrears of rent and for ejectment of the tenant in default of payment of such arrears, and the amount claimed is under Rs. 100, an appeal is barred under section 102 of that Act.

The proceedings in execution of the decree in such a suit are to be treated as part of the suit, and subject to the same rule as regards jurisdiction as the suit itself.

APPEAL from an order of the Officiating Judge of Tipperah, reversing an order of the Moonsiff of Kusbah.

In this case an application was made on the 12th November 1878, to execute a decree which had been passed against one Shaikh Mandari by ejecting him from his jote.

By the decree in question it was ordered that the defendant should pay to the plaintiff Rs. 3-12 within 15 days, or in default be ejected from his jote. That sum was paid into Court on the 4th December 1878; but the judgment-debtor, on being examined, stated that he had previously repeatedly tendered the money to the decree-holders, but that they had refused to accept it until the 4th December. The receipt for the money was dated November 29th, 1878. It was not stated in the order from what date the period of 15 days' grace would run.

The Moonsiff, under the circumstances, considered that the case was not one for the exercise of his discretion in extending the period of grace, and directed that the judgment-debtor should be ejected.

1879

PARBUTTY CHURN SEN v. SHAIKH MANDARI.

Judgment.

On appeal to the Officiating Judge this order of the Moonsiff was reversed, and this second appeal was thereupon preferred to the High Court by the decree-holders.

Baboo *Troilukya Nath Mitter*, for the Appellants.

Baboo *Greesh Chunder Chowdhry*, for the Respondent.

Baboo Greesh Chunder Chowdhry took a preliminary objection that the suit was barred under section 102 of Act VIII (B.C.) of 1869, the amount claimed in the suit having been under Rs. 100.

Baboo Troilukya Nath Mitter contended that, so far as the suit was for the recovery of arrears of rent, the order of the Judge was final; but the question now on appeal was, whether the tenant should be ejected from the land in suit, as a consequence of non-payment of the decretal amount within 15 days from the decree. He urged that the objection could only be sustained by it being shewn that the value of the land from which the tenant was to be ejected was of a less value than Rs. 100. As to that there was no evidence on the record. If this objection should be allowed to prevail, it might happen that, for the non-payment of one rupee within 15 days, an order might be passed for the arbitrary ejectment, without a right of appeal, of a tenant, from a holding worth a lac of rupees.

The following judgment of the Court (1) was delivered by

MORRIS, *J.* MORRIS, *J.*:—

Where a suit is brought under section 52 of the Rent Law for the recovery of arrears of rent and for ejectment in the same action, and the amount claimed is less than Rs. 100, an appeal cannot, under section 102, lie to this Court. The ejectment of the ryot is not a necessary consequence of execution of the decree in such a suit. It depends entirely upon a contingency arising out of the neglect or recusancy of the ryot to make payment within the time specified. That being so, the jurisdiction of the Court cannot possibly be affected by the conduct of one of the

(1) MORRIS and PRINSEP, *J.J.*

arties in the course of execution of the decree. The suit must, 1879
'e think, be dealt with as it was originally laid, and the proceedings
n execution treated as a part of that suit, and subject to the
ame rule as regards jurisdiction throughout the various stages
s the suit itself. In this view the preliminary objection must
revail, and the appeal be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

AJLUKHY DASSEE, BY HER GUARDIAN ROKHAKUR MOZUMDAR (JUDGMENT-DEBTOR) . . . . . APPELLANT;

Nov. 21*st.*

No. 117 of 1879.

AND

ASH MUNJURY CHOWDHRAIN (DECREE-HOLDER) . . . . . RESPONDENT.

imitation—Execution of decree, Proceedings in aid of—Limitation Act XV of 1877, *Sched. II, Art.* 179, *Cl.* 4.

On the 16th January 1875 a decree-holder applied for execution of his decree, and the 3rd of March 1875 was fixed for the sale of the judgment-debtor's property. On the last-mentioned date the debtor applied for two months time, and the decree-holder assented to postponement for that length of time only. The application was granted, and the Court thereupon struck the case off the file. Nothing further was done until the 25th February 1878, when the decree-holder again applied for execution. *Held*, that the application of 3rd March 1875 was in fact a step taken in aid of execution of the decree, and that the application of 25th February 1878 was, therefore, under Act XV of 1877, Sched. II, Art. 179, clause 4, within time.

PPEAL from an order passed by the Judge of Rungpore, ersing the order of the Moonsiff of Gyebanda.

In this case the respondent applied on the 25th February 78 for execution of a decree which was passed in July 1868. Various proceedings in execution, it seems, had taken place— last by the decree-holder being an application on the 16th nary 1875 for the sale of the debtor's property. The 3rd of ch 1875 was fixed for the sale, but on that day the judgt-debtor applied for two months time, in order that he might

1879

RAJLUKHY DASSEE v. RASH MUNJURY CHOWDHRAIN.

Judgment.

be able to collect the money due under the decree. To this the decree-holder assented, saying that he had no objection to proceedings being adjourned, provided not more than two months were granted. On the same day the Moonsiff directed the postponement of the sale, and ordered the case to be struck off the file. It does not appear that he had any authority for making this latter order.

Nothing further was done until the 25th February 1878, when the decree-holder, as above stated, again applied for execution. The question was, whether this application was within time. The Moonsiff held that it was not, as the application of the 3rd March 1875 was not, in his opinion, an application to keep in force the decree, or to take some step in aid of its execution.

The District Judge, on appeal, held that the proceedings of 1875 never came to a legal termination, the Moonsiff not being warranted in striking the case off the file, and that consequently the application of 25th February 1878 was not a new application, but only a revival of suspended proceedings. He referred to the cases of *Huronath Bhungo* vs. *Chunnilall Ghose*, 3 C. L. R., 165; and *Golami Sahu* vs. *Chutterbhooj Patuck*, ib., 261.

From the order directing the case to be returned to the Moonsiff for execution, the judgment-debtor preferred this appeal to the High Court.

Baboo *Shoshee Bhusun Dutt*, for the Appellant.

Baboo *Mohiny Mohun Roy*, and Baboo *Grija Sunker Mozumdar*, for the Respondent.

The following judgment of the High Court (1) was delivered by

MORRIS, *J.* MORRIS, *J.*:—

It is clear that the application of the decree-holder on the 25th February 1878 to revive proceedings in execution must be governed by Act XV of 1877, which was then in force. It appears to us that under clause 4 of Article 179 of the second Schedule of that Act, this application was within time; because

(1) MORRIS and PRINSEP, *J.J.*

1879

we understand the order of the Court made on the 3rd March 1875 to be in point of fact a step taken in aid of execution of the decree. For this reason, it is unnecessary to consider the other grounds that are taken by the District Judge.

We, therefore, affirm his order allowing execution proceedings to proceed, and dismiss this appeal with cost.

[CIVIL APPELLATE JURISDICTION]

KALI COOMAR CHATTERJEE AND ANOTHER . APPELLANTS ; *December 2nd.*

AND

TARA PROSUNNO MOOKERJEE. . . . . RESPONDENT.

No. 168 of 1879.

Minor—Certificate to collect debts—Act XXVII of 1860.

SEMBLE.—A certificate to collect debts under Act XXVII of 1860 may be granted to a minor by his next friend.

APPEAL from an order passed by the Judge of Hooghly.

In this case one Tara Prosunno, the respondent, applied for a certificate under Act XXVII of 1860 in respect of certain Government securities belonging to the estate of his uncle Juggo Prosad, deceased. The two appellants, Kali Coomar Chatterjee and Russick Lall Banerjee, opposed the grant of a certificate to the petitioner, each claiming a right to such a certificate for himself, the former on the ground that he was the natural father of a minor son whom he alleged to have been adopted by the deceased, and the latter that he was the husband of the granddaughter of the deceased.

The petitioner, who denied the adoption, was, if the adoption were void, the next heir according to Hindu Law. The Judge refused to try the question of adoption, on the ground that, assuming the adoption to be valid, no certificate under the Act could be granted to the minor or to any one on his behalf, but made an order granting a certificate to the petitioner.

Against this order the appeal was preferred.

Baboo *Troylucko Nath Mitter,* for the Appellants.

Baboo *Bama Churn Banerjee,* for the Respondent.

1879

KALI COOMAR CHATTERJEE v. TARA PROSUNNO MOOKERJEE.

Judgment.

JACKSON, J.

The following judgment of the High Court (1) was delivered by

JACKSON, *J.*:—

We think the Judge was right in declining to enter into evidence as to the fact of the adoption of the alleged son, not, however, on the ground that a minor cannot be granted a certificate under Act XXVII of 1860. On the contrary, we see no reason why a minor should not, by his next friend, obtain a certificate under that Act. But an adopted son not being, so to say, a natural heir and the fact being disputed, we think the Judge was warranted in refusing to enter into that investigation, and that the certificate was properly given to the nephew of the deceased who was the next heir according to the Hindu Law in the absence of any nearer kinsmen and heirs. Regard, however, being had to the fact that an adopted son has been set up and that proceedings have been, or probably will be taken to establish his rights, the proper course, we think, would be to take security from the person to whom the certificate has been given.

The appeal is dismissed with costs.

(1) JACKSON and TOTTENHAM, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

ELAHEE BUX CHOWDHRY AND OTHERS . . PETITIONERS; AND KALLY MOHUN MOOKHOPADHYA AND ANOTHER . . . . . RESPONDENTS. No. 102 of 1879.

Money paid in execution of Decree, Suit to recover—Decree superseded.

A decree which contained the condition that the rent of the year 1279, in excess of the ordinary rent, should be allowed only in the event of the Appellate Court affirming a previous decree allowing a similar sum in excess, as enhanced rent for the year 1278, was allowed to be executed in respect of the enhanced rent before the Appellate Court had given its decision, no objection having been made by the judgment-debtors. The Appellate Court having subsequently disallowed the enhanced rent claimed for the year 1278, it was held that the judgment-debtors were entitled to recover the amount paid by way of enchanced rent for 1279. *Shama Pershad Roy Chowdhry* vs. *Huro Pershad Roy Chowdhry*, 3 W. R., P. C. 11; and *Jogesh Chunder Dutt* vs. *Kali Churn Dutt*, I. L. R., 3 Cal. (F.B.) 30, cited.

THIS was an appeal from an order passed by the Officiating Judge of Tipperah, under the following circumstances:—On the 11th August 1878 a rent suit, No. 26 of 1876, was decided by the First Subordinate Judge of Tipperah, decreeing the sum of Rs. 850 and enchanced rent at Rs. 479 for the year 1279. Previously to this decision, a suit for the rent for 1278, at an enhanced rate, had been brought before the Moonsiff at Amirgoon and dismissed on account of non-service of notice. That case was appealed and remanded, and again, on the 11th December 1876, dismissed on the ground of limitation. It was again appealed, and the order of the Moonsiff reversed. On second appeal to the High Court the Judge's order was set aside on the 9th July 1878, on the ground of limitation. Meanwhile the Subordinate Judge's decree of the 11th August had been executed.

The petitioners now sought to get back the sum of Rs. 540, representing the amount of enhanced rent paid in execution, and interest thereon.

1879

ELAHEE BUX CHOWDHRY v. KALLY MOHUN MOOKHOPADHYA.

Judgment.

It was urged before the District Judge that the part of the decree relating to the enhanced rent was conditional on an enhanced rent being allowed on the appeal which was pending in the other suit.

The decree in question was not appealed from, nor altered on review.

The District Judge was of opinion that the objection should have been taken when execution in respect of the enchanced rent was applied for. He accordingly dismissed the application.

The petitioners, thereupon, preferred this appeal to the High Court.

Baboo *Rajendro Nath Bose*, for the Appellants.

Baboo *Kashi Kant Sen*, for the Respondents.

The following judgment of the High Court (1) was delivered by

MORRIS, *J.* MORRIS, *J.* :—

This appeal raises a question as to the proper reading of the decree which is sought to be executed, and the still more important question whether the lower Court was right in refusing to allow certain monies that had been paid in execution of the decree to the judgment-creditor, to be recovered back and refunded to the judgment-debtors.

The lower Court, as we think, read the decree right, namely, as a decree containing the condition that the rent claimed for 1279, in excess of the ordinary rate, should be allowed only in the event of the Appellate Court affirming a previous decree, allowing a similar sum in excess as enhanced rent for the year 1278. The decree was positive only in regard to the amount claimed at the old rate of rent, and it seems singular that in spite of the condition relative to the sum claimed as enhanced rent, the Court, in the execution department, should, before the appeal referred to in the decree was decided, have allowed the judgment-creditor to take out execution and compel the judgment-debtors to pay a portion of the excess demand. When the appeal was decided in favour of the judgment-debtors, and the sum claimed as enhanced rent of 1278 was disallowed by the dismissal of the suit, the judgment-debtors sought a refund of the

(1) MORRIS and PRINSEP, *J.J.*

that had been paid by them in excess, and referred to the conditional terms of the decree in support of their claim. The Judge has refused their application on the ground that it ought to have been made when the conditional part of the decree came to be executed, and that as the decree continues in force, having been neither appealed against nor sought to be altered in review, the order of the execution department cannot be altered. He also adds that there is no procedure which can be found for remedying the error in the way now sought by the petitioners

The Judge, when he passed this order, could not apparently have had his attention drawn to the opinion expressed by the Privy Council, in the case of *Shama Pershad Roy Chowdry* vs. *Hurro Pershad Roy Chowdry*, 3 W. R., P. C. 11, or to the case, somewhat similar to the present, of *Jogesh Chunder Dutt* vs. *Kali Churn Dutt*, I. L. R. 3 Cal. (F.B.) 30.

The ruling laid down by the Privy Council is clear, namely, that "money recovered under a decree or judgment cannot be recovered back in a fresh suit or action, whilst the decree or judgment under which it was recovered remains in force; and this rule of law rests upon this ground that the original decree or judgment must be taken to be subsisting and valid, until it has been reversed or superseded by some ulterior proceeding." In the present case, admitting that the execution department allowed the judgment-creditor to realize, under his decree, a portion of the amount claimed as enhanced rent, there can be no question that in accordance with its express terms that part of the decree was "superseded" by the proceeding in appeal relative to the enhanced rent of 1278; and again under the authority of the Full Bench, above quoted, the decree, if it be a decree for enhanced rent of 1279, must be treated as subordinate to, and dependent upon, the decree which disallowed the enhanced rent claimed for 1278.

The order of the Judge is, therefore, set aside, and the judgment-debtors, appellants, are declared entitled to recover back from the judgment-creditors, with interest at 6 per cent. per annum, such amounts as were realized by them as enhanced rent under the decree. The Judge will, upon this application of the judgment-debtors, take the necessary steps for the recovery of the money.

[CIVIL APPELLATE JURISDICTION.]

1879 Dec. 11th.

No. 185 of 1879.

BECHARAM PAUL AND ANOTHER . . . } (JUDGMENT-DEBTORS), APPELLANTS;

AND

BHUGWAN CHUNDER GHOSE . . } (DECREE-HOLDER), . RESPONDENT.

Execution of decree—Decree, Addition to, or alteration of—Appellate Court.

It is not competent to the Appellate Court in a matter arising in execution to add to, or alter the decree.

APPEAL against an order of the Judge of the 24-Pergunnahs, reversing an order of the Moonsiff of Alipore.

Baboo *Golap Chunder Sircar*, and Baboo *Gyanendro Nath Dass*, for Appellants.

Baboo *Saroda Churn Mitter*, for Respondent.

The facts are fully stated in the following judgment of the Court (1), which was delivered by

JACKSON, J. JACKSON, *J.*:—

It appears to us that the order of the lower Appellate Court in this case is not warranted by the law. The plaintiff had claimed certain property which, he said, had been left in deposit with one Shyam Soondur Pal, and this Pal admitted in fact the deposit, and alleged that the property in question was in a certain chest within a room, upon which Becharam and Ashootosh, the appellants before us, had affixed a separate lock of their own; and it appears that as between Shyam Soondur and these two persons there was a dispute regarding certain joint-family property. Becharam and Ashootosh denied that Shyam Soondur had any such property in his custody, and alleged collusion between him and the plaintiff. The suit was brought by the

(1) JACKSON and TOTTENHAM, *J.J.*

plaintiff to recover this property and was dismissed by the Moonsiff, but on appeal the Subordinate Judge made a decree in the following terms:—"The plaintiff's suit is to be decreed in this way, that the Nazir must go and take out the property specified from the iron chest and deliver it to the plaintiff, and that the plaintiff must have his costs from the defendants, respondents. The Nazir accordingly repaired to the place, but meanwhile the defendant Shyam Soondur had died, aad a difficulty arose as to opening the room in which the box was placed. Finally, notice was given to the representatives, the room was unclosed and the box was opened, and it was found not to contain the property. In these circumstances, an order was made for the arrest of the other defendants; they were arrested and brought before the Moonsiff, and he found that the decree made no provision for the circumstances which had happened; that there was no alternative for the money payment; that the judgment-debtors had not the custody of the specific moveables; that they had been in the hands of Shyam Lall alone; that the decree did not specify from whom the property was to be recovered if not found by the Nazir; and that the particular relief directed by the decree not being practicable, there was no resource left. So he ordered the judgment-debtor to be set at liberty.

On appeal by the plaintiff, the District Judge says:—"Although the decree does not say that they, viz., Becharam and Ashootosh and Shyam Soondur are to deliver the articles to the Nazir who is to find them, and although it does not specify any amount to be paid as an alternative, if delivery cannot be had, still the value being beyond doubt, it seems to be proper that the persons liable under the decrees should not escape without accounting for the value of the property. And this makes it necessary to read the judgment of the Subordinate Judge." "Clearly," he says, "the property would not have been withheld from plaintiff but for Becharam and Ashootosh's claim." Now, it is sufficient to say that even as the assumption that the two defendants could be made liable, which is far from clear, the circumstances on which the Judge relies were such as might have been considered by the Court making the decree, but that it is not competent to the Appellate Court, in a matter arising

1879

BECHARAM PAUL v. BHUGWAN CHUNDER GHOSE.

Judgment.

JACKSON, J.

in execution, to add to the decree. It is, as I observed during the argument, the business of the plaintiff's pleader to see that his client gets a proper decree, so that he may have the full benefit of the judgment of the Court. If the pleader neglects that duty, and in consequence an inadequate decree is passed, it is not possible afterwards in execution to remedy that defect. The decree in this case provided no relief other than the delivery of the property by the Nazir in a certain way, and no Court, except the Court which passed the decree upon a proper application, could alter or add to that decree. I think, therefore, that the Moonsiff was right, and that the judgment of the lower Appellate Court must be set aside with costs.

[ORIGINAL CIVIL JURISDICTION.]

Dec. 19th.

POYNOR BIBEE AND OTHERS . . (PLAINTIFFS), APPELLANTS;

AND

NUJIB KHAN . . . . . (DEFENDANT), RESPONDENT.

Bond in name of Judge to secure costs—Practice of High Court—Assignment of surety bond—Rule Nisi.

The proper mode of proceeding to enforce a security bond in the name of a Judge of the Court for the costs that may be incurred in a suit is to apply on petition for a rule *nisi*, calling upon the sureties to show cause why the party to whom the costs are payable should not be at liberty to bring a suit upon the bond in the name of the Judge as plaintiff, and to sign and verify the plaint and proceedings in the suit; or why the bond should not be assigned over by the Registrar of the Court to him for the purpose of being sued upon.

THIS was an application for a Rule under the following circumstances:—A suit was instituted in the High Court in 1876 by Poynor Bibee and others against the petitioner Nujib Khan, and on the 14th December of that year it was tried and dismissed with costs.

The plaintiffs thereupon appealed against the decree. Pending the appeal, an application was made for an order that the appellants should give security for Rs. 1,000 for the costs that might be incurred by the defendant, in respect of the appeal. The appli-

1879

POYNOR BIBEE v. NUJIB KHAN.

Statement.

was granted, and on the 10th of May 1879 one Poorno Chunder Mookerjee was approved of by the Registrar of the Court as a surety for such costs to the extent of Rs. 1,000. The plaintiffs and Poorno Chunder Mookerjee thereupon duly executed and registered a bond whereby they were jointly and severally bound unto Sir RICHARD GARTH, Chief Justice of the High Court, in the sum of Rs. 2,000, on condition that, if the obligors should pay all such costs of the defendant, not exceeding Rs. 1,000, as should become payable under any order or decree in the suit, then the bond should be void. By way of further security Poorno Chunder Mookerjee also charged, subject to the same condition, certain immovable property at 12, Furriapooker Street, in Calcutta, with the payment of the costs that might be ordered or decreed.

On the 26th June 1877 the appeal was dismissed with costs on scale No. 2, and the appellants were ordered to pay such costs.

On taxation it was found that the costs of the appeal amounted to Rs. 1,375-3-0. No portion of this sum having been received from the appellants, or from Poorno Chunder Mookerjee, a rule was applied for on the 20th November 1879, calling upon the appellants and Poorno Chunder Mookerjee, within four days after service of the rule upon them, to show cause why the respondent should not be at liberty to bring a suit upon the bond in the name of Sir RICHARD GARTH, the Chief Justice, and to sign and verify the plaints and proceedings in such suit.

Allen (for the petitioner on the application for the rule) cited the case of *Nezam Begum* vs. *Hafiz Moulvie Syud Ajeeb Ahmed* [unreported (1),] in which an order was made in 1866, under

(1) In that case the plaintiffs, by an order dated 13th May 1864, were required to furnish security for the defendant's costs of the suit.

Under that order one Lal Mohun Mookerjee executed a bond to Mr. Justice PETERSON in the penal sum of Rs. 2,000, the condition being that, if the plaintiffs should pay to defendants such costs as might be decreed to him, the said bond should be void.

The suit was dismissed with costs. On the 5th September 1866, on the application of the defendent, it was ordered that a plaint be filed in the name of Lal Mohun Mookerjee, and that the warrant be signed and plaint verified by the Registrar.—ED.

1879

POYNOR BIBEE v. NUJIB KHAN.

Order.

similar circumstances, that a plaint should be filed in the name of Mr. Justice PETERSON, in whose name a similar bond had been executed.

Another method of enforcing the bond was, he submitted, to have it assigned for the purpose of a suit being brought upon it. That was done upon bonds similar to those provided for by section 256 of the Succession Act, in the cases of *Marshman* vs. *Brookes*, 32 L. J. P. and M., 25; and In the Goods of *Jones*, ib., 26.

[WHITE, *J.*—I think the proper course is for you to add an alternative prayer to your petition, for an order that the bond be assigned to your client for the purpose of being sued upon by him. Subject to that alteration being made in your petition you may have a rule to show cause why the defendant should not be at liberty to bring a suit upon the bond in the name of Sir RICHARD GARTH, Chief Justice, as plaintiff in such suit, and to sign and verify the plaint and proceedings in such suit; or why the bond should not be assigned over by the Registrar of this Court to the defendant, his executors and administrators, for the purpose of a suit being brought thereon.]

On the 18th December 1879, Mr. *Allen* applied before Mr. Justice WILSON to make the Rule absolute, and on the following day that learned Judge, after consultation with Mr. Justice WHITE, granted the application.

[ORIGINAL CIVIL JURISDICTION.]

OVIND LOLL SEAL AND OTHERS . . . . PLAINTIFFS; 1880 *Jany. 23rd.*

AND

EBENDRO NATH MULLICK AND OTHERS. DEFENDANTS. No. 430 of 1878

imitation—Act XV of 1877, *Sched. II, Arts.* 139, 142 *and* 144—*Discontinuance of possession—Adverse possession.*

Where there has been possession followed by discontinuance of possession, limitation runs from the moment of its discontinuance whether there has or has not been any adverse possession, and without regard to the intention with which, or the circumstances under which, possession was discontinued.

A, the owner of a house, without taking any acknowledgment of his title, allowed B, and after him his representatives, to remain in exclusive occupation of the house for upwards of 30 years free from rent, and after that time brought a suit for ejectment. A retained the title deeds in his possession and paid the rates and taxes. *Held*, that although in England the relation of the parties might be that of a tenancy-at-will, it was not that of landlord and tenant within the meaning of article 139 of the Limitation Act, XV of 1877, Schedule II.

N this case the plaintiff sued to recover certain immoveable roperty in the possession of the defendants.

For the defence it was alleged that the property in question had en given, upwards of 30 years ago, as a gift to Sumboonath ullick, the father of the male defendants and of the late sband of the female defendant, by the late Mutty Loll Seal, rough whom the plaintiff claimed.

It was admitted that upwards of 30 years ago Sumboonath d been in possession and exclusive enjoyment of the property question, and that from the time of his death the defendants, his representatives, had continued in possession. Neither mboonath nor the defendants had at any time paid, or been d by Mutty Loll Seal or by any one claiming under him to rent, until recently, when it seems that ill feeling had n between the two families in consequence of the part n by some of them in certain litigation. The title deeds,

1880

GOVIND LOLL SEAL v. DEBENDRO NATH MULLICK.

Argument.

it was shown, had always remained in the possession of the Seals, the rates and taxes had been paid by them and the property stood in the names of the Seals in the books of the Municipality and of the Collector, and in the general register under Act VII (B.C.) of 1876.

The defendants were unable to prove satisfactorily the actual gift of the house to Sumboonath. It appeared, however, that he, and after him his family, had constantly been in the habit of receiving maintenance from the Seals. The defendants also gave evidence that they had built a *poojah dallan* at their own expense on the premises in question.

Branson and *Phillips*, for the Plaintiffs.

Kennedy and *Henderson*, for the Defendants.

Kennedy contended that the suit was barred by limitation, under Art. 142 of Act XV of 1877, Sched. II, inasmuch as there had been a discontinuance of possession by the plaintiffs or their ancestor from the time that Sumboonath was permitted to take possession of the house. He referred to *Jack* vs. *Walsh*, 4 Ir. L. R., 254; *Moore* vs. *Doherty*, 5 Ir. L. R., 449; *Ellis* vs. *Crawford*, 5 Ir. L. R., 402.

Branson.—The Article which applies to this case is Art. 144, and the suit is not barred because there was no adverse possession until the plaintiffs had called upon the defendants to give up possession, and they had refused to do so.

The Article relating to discontinuance is intended to meet the cases such as the abandonment of chur lands.

The defendants have been merely in permissive occupation of the house, and no cause of action could have arisen, until we had demanded and been refused possession, or until our title had been denied—*Nund Coomar Banerjee* vs. *Phillip*, 8 W. R., 385.

[WILSON, *J.*—The present Act nowhere makes the arising of of the cause of action the point from which limitation commences to run.]

In a case under Act XIV of 1859—*Rewat Lall Singh* vs. *Khurrack Dharee Singh*, 12 W. R., 167—MARKBY, *J.*, says:—

"The Statute of Limitation never begins to run until there has been a cause of action." (See p. 169.)

If the case does not fall within Art. 144 it comes within Art. 139, for the defendants were merely as tenants-at-will.

The following judgment was delivered by

Judgment.

WILSON, *J.*

WILSON, *J.* :—

The plaintiffs in this case were the successors in title to one Mutty Loll Seal who died in 1854, and as such they seek to recover a house, of which the defendants are in possession.

The defendants are the sons and widow of Sumboonath Mullick, who died some 20 years ago.

The house in question was formerly the property of Mutty Loll Seal. Sumboonath Mullick was a friend or dependent of Mutty Loll Seal, and was for many years the object of his bounty. Some thirty years ago, several years before the death of Mutty Loll Seal, Sumboonath entered upon possession of the house, and from that time to the present he, and after him the defendants, have been in exclusive occupation.

So far there is no dispute. Then the case of the plaintiffs is set out in paras. 11 and 12 of the plaint.

"11.—The said Sumboonath Mullick, who had been an old dependent of the plaintiff's father, Mutty Loll Seal, was permitted by the said Mutty Loll Seal to occupy the house and premises No. 69, Chunnumgully, without paying any rent for the same."

"12.—Since the death of the said Sumboonath Mullick, which took place about 20 years ago, the defendants have been permitted up to the time hereinafter stated to reside in the said premises without paying rent for the same."

The case of the defendants is set out in para. 2 of the written statement.

2.—"The said Mutty Loll Seal was an intimate friend of Amruttun Mullick, the father of the said Sumboonath Mullick, and the latter being in very reduced circumstances, the said Mutty Loll Seal, about thirty years ago, made a gift of the house

1880

GOVIND LOLL SEAL v. DEBENDRO NATH MULLICK.

Judgment.

WILSON, J.

in the plaint mentioned to him, the said Sumboonath Mullick, and he was in possession during his life, and since his death, about 20 years ago, the defendants have been in possession of the said house by virtue of the said gift."

As to which of these stories is the true one there is no direct evidence, nor could there well be, both parties to the original transactions being long since dead.

The circumstances in favor of the plaintiffs are these:—The title deeds have remained in the possession of the Seals The rates and taxes have been paid by them, and repairs have from time to time been executed by them (upon this point I accept the evidence of the plaintiff's witnesses). In the books of the Municipality, and in those of the Collector, the house has always stood in the names of some of the Seals, as also in the general register under Bengal Act XII of 1876.

Several witnesses also spoke to various conversations and oral admissions. But these I reject as untrustworthy.

The payment of rates and taxes, and the execution of repairs, are at first sight strong indications of ownership. But they lose their force when it is considered that Sumboonath and his family were the objects of the bounty of the Seals, receiving from them for many years a regular allowance for their maintenance. I cannot say that the Seals may not have been just as likely to pay their taxes and repair their house as to provide them with maintenance.

Again the fact of the house standing always, in the books I have referred to, in the names of some of the Seals is at first sight a circumstance of weight. But on closer consideration it loses its force. The plaintiffs' case is, that the house descended to the heirs of Mutty Loll. In the Collector's books throughout, and in the Register under Bengal Act VII of 1876, the persons entered as owners are the trustees of the late Mutty Loll Seal. The meaning of this expression was not clear till a comparatively late stage of the case. But Mr. Meek, manager of the plaintiffs, when recalled for another purpose, explained it. There was a deed executed by Mutty Loll, by which he settled certain property in trust for his family, and this house is not included in it. Whoever, therefore, caused those entries to be made did so, upon

any view of the case, in entire ignorance of the facts, and the entries are as inconsistent with the plaintiffs' case as with the defendants. I can draw no inference from such entries.

In favour of the defendants are the facts that they and their father and husband have been in exclusive possession for thirty years; that they have paid no rent, and have neither given nor been asked to give any acknowledgment of the plaintiffs' title; and that no claim to expel them was ever made till lately, after ill-feeling had arisen by reason of other litigation in which some of the parties to this suit were concerned; and that some years ago the defendants built a *poojah dalan* in the house at their own expense, though it is sworn, and probably with truth, that some at least of the materials were given by the Seals.

It lies upon the plaintiffs to prove their case, and recover by the strength of their own title. I think they have failed to prove the case they have set up.

I am further of opinion that, even if the plaintiffs had established the case they contend for, their claim would be barred by limitation. The period of limitation and the point from which it is to run in claims for possession of land are dealt with in Articles 134 to 144 (inclusive) of the second schedule to the Limitation Act. The first thing to be observed about these provisions is, that (differing herein from some earlier Acts) the present law in no instance makes the accruing of a cause of action the point from which limitation is to run in claims to possession of land. No doubt in many, probably in most, instances the point adopted as the starting point is in fact coincident with the accruing of the cause of action; but it is not necessarily so. Just as under the English Act 3 & 4 William IV, Chapter 27, limitation may in some cases begin to run before any right of action has arisen—*Owen* vs. *De Beauvoir*, 16 M. and W., 547.

Secondly, it seems clear that the framers of the Act were minded to get rid of the distinction between adverse and non-adverse possession wherever it could be done, wherever any other test could be found. Accordingly it is only in the last Article, No. 144, in cases not otherwise provided for, that the idea of adverse possession is allowed to come in.

1880

GOVIND LOLL SEAL v. DEBENDRO NATH MULLICK.

Judgment.

WILSON, J.

Three Articles have been referred to, and I think rightly, as those under some one or other of which the present case must fall—viz., Articles 139, 142 and 144. Article 139 deals with suits by a landlord to recover possession from a tenant, and the limitation runs from "the time when the tenancy is determined." Art. 142 deals with suits for possession of immoveable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession, and limitation runs from "the date of the dispossession or discontinuance." Art. 144 deals with suits for possession of immoveable property or any interest therein not hereby otherwise especially provided for; and limitation runs from the time "when the possession of the defendants become adverse to the plaintiff."

The case does not, in my opinion, fall under Article 139. It may be that in England a person in the position in which the plaintiffs allege Sumboonath to have been, might properly be called a tenant-at-will. But the Limitation Act is an Act passed not for the presidency towns, but for British India. And I do not think, assuming the plaintiff's story to be proved, that the relation of the parties would be that of landlord and tenant within the meaning of those words as used in such an Act.

In Art. 142 it appears to me that the Legislature intended to adopt the policy of the English Act, 3 & 4 William IV, c. 27, section 3, from which the language is taken; and I think full effect must be given to the plain meaning of the words used. The meaning seems to me to be this; that where there has been possession followed by discontinuance of possession, time runs from the moment of its discontinuance, whether there has or has not been any adverse possession, and without regard to the intention with which, or the circumstances under which, possession was discontinued. In the present case I think it appears that 30 years ago Mutty Loll Seal was in possession of the premises in dispute, and that he then discontinued possession by puting Sumboonath Mullick in possession.

It was urged that this construction might in some cases work hardly. It may be so. In any case at all analogous to the present I do not think it could. The true owner can always

rotect himself, either by taking care to establish the relation of landlord and tenant between himself and the person he puts in ossession, or by insisting on periodic acknowledgments of his itle under section 19 of the Act. 1880

It follows from what I have said that, in my opinion, Article 44 has no application to this case.

On both grounds, therefore—first that the plaintiffs have failed o prove their case; secondly, that if they had, their claim would e barred by limitation—I think the suit must be dismissed ith costs.

[CIVIL APPELLATE JURISDICTION.]

HANGES MANUFACTURING CO. (DEFENDANTS) APPELLANTS; *February 3rd.*

AND

OORUJMULL AND OTHERS (PLAINTIFFS) . . . RESPONDENTS.

Estoppel—Evidence Act, sections 2, 115, 116, 117.

C. and Co. contracted to buy from the defendants a large quantity of gunny bags, payment to be made on delivery. On the 22nd July 1878, there remained undelivered 101,500 bags, but on that day C., of the firm of C. and Co., informed the Agents of the defendants that he had arranged to take delivery of 51,500, and he made a further purchase of 30,000 twilled bags. On the following morning delivery orders were granted for the 51,500 and the 50,000 twilled bags. In the afternoon C. called on the Agents of the Company and handed them an open letter from C. and Co. to the Agents in the following terms:—"With reference to your delivery orders Nos. 45 to 52 for 51,500 C. bags and Nos. 53 to 55 for 30,000 H. twills, we have handed the delivery orders to Baboo Roop Chand Somair Mull, to whom you will please deliver the bags as may be required." C. said that arrangements had been made to take the bags, and he wished them to be personally delivered to R., whom he had brought with him. (R. was the representative of the plaintiffs). At C.'s request, the Agents wrote the following words upon the letter: "The bearer of this will personally take delivery of each lot as required." No conversation took place with R.

On the strength of that order the plaintiffs advanced Rs. 15,000 to C. and Co., and a large portion of the bags was delivered to the plaintiffs under the order, without their being required to pay for them on delivery. C. and Co. having become insolvent the defendants refused to deliver any more bags.

1880

GANGES MANUFACTURING CO. v. SOORUJMULL.

Statement.

Held (affirming the decision of the Court below), that the defendants were estopped from receding from the arrangements entered into by their Agents.

Section 2 of the Evidence Act, which repeals all rules of evidence not contained in the Act itself, does not debar the Courts in India from entertaining questions in the nature of estoppel not coming within the scope of Chap. VIII.

APPEAL from a decision passed by Mr. Justice WILSON.

This was a suit to recover from the defendants the sum of Rs. 7,224-8 as damages for the non-delivery by the defendants to the plaintiffs of 37,400 gunny bags, agreed to be delivered under a contract, dated the 23rd of July 1878.

The plaintiffs stated that, in consideration of their advancing Rs. 1,500 to Messrs. Cohen & Co., a firm with whom the defendant Company through their agents had various business dealings for some time previously, the defendants, on the 23rd of July 1878, contracted to deliver to the plaintiffs 87,500 gunny bags; that on the same day they paid Messrs. Cohen & Co. the sum of Rs. 15,000, and so fulfilled their part of the contract; that the defendants delivered to the plaintiffs in pursuance of the contract 50,000 bags, but declined to deliver the remaining 37,500 bags, although repeatedly requested to do so.

The defendants denied that they had contracted to deliver to the plaintiff on the consideration mentioned by them. They also denied that they had unconditionally agreed to deliver to the plaintiffs the 37,500 bags. They further denied that it was upon the faith of such an agreement that the plaintiffs had advanced Rs. 15,000 to Messrs. Cohen & Co.

It appeared that Messrs. Cohen & Co. had bought 87,500 bags from the defendant Company, the conditions being that they were to be paid for on delivery.

The bags were not paid for, but Messrs. Cohen & Co. had obtained delivery orders in respect of them. That being so, Messrs. Cohen & Co. proposed to the plaintiff to advance money on the security of the goods represented by the delivery order, and thereupon wrote the following letter:—"From Cohen Brothers and Co., to Messrs. MacNeill & Co., Agents, 'Ganges Jute Co.,' July 23rd 1878. Dear Sirs,—With reference to your delivery

orders, Nos. 45 to 52 for 57,500 C. bags, and Nos. 53 to 55 for 30,000 A Twills, we have handed the delivery order to Baboo Roop Chand Somair Mull, to whom you will please deliver the bags as may be required. Yours faithfully, Cohen Brothers and Co.

Cohen and Ram Rutton, the plaintiffs' manager, then went to the defendants' agents and saw Mr. Lyall, the gentleman who had charge of the defendants' business. Ram Rutton was pointed out as the man to receive delivery, and the letter was given to Mr. Lyall. Mr. Lyall at first initialed the letter, but subsequently at Cohen's request wrote on it, "The bearer of this will personally take delivery of each lot as required." The letter was given to Ram Rutton, and on the faith of it the plaintiff advanced Rs. 15,000 to Cohen & Co.

The defendants delivered to the plaintiff 50,000 bags. They, however, refused to deliver the remaining 37,500 bags, claiming to hold them till the price was paid. The plaintiffs, therefore, brought this suit to recover damages for non-delivery.

Kennedy and *Phillips*, for the Appellants.

Branson, *Bonnerjee* and *Allen*, for the Respondents.

Kennedy.—The defendant Company claims to hold the goods absolutely as their own.

[GARTH, *C.J.*—The question is, whether the defendants did, or did not put it out of their power to claim a lien on the undelivered portion of the goods sold.]

We do not claim a lien on the goods. We say that the property could not pass to the plaintiffs except on payment of the price. If we have attorned to the plaintiffs, we have done so only on the conditions upon which the goods were sold to Cohen, viz., cash on delivery.

In the case of *Knight* vs. *Wiffen*, L. R., 5 Q. B., 660, relied upon by the lower Court, it is not clear whether the sale was not upon credit. There the property had no doubt passed. That case, too, was decided entirely upon the doctrine of estoppel.

[PONTIFEX, *J.*—But are you not estopped in this case, under

1880

GANGES MANUFACTURING CO. v. SOORUJMULL.

Argument.

section 115 of the Evidence Act? Did you not induce the plaintiffs to believe that the goods would be delivered?]

There is nothing in the letter signed by Lyall which would show that the property had passed as in *Knight* vs. *Wiffen*.

[GARTH, *C.J.*—I cannot distinguish the present case from *Woodley* vs. *Coventry*, 2 H. and C., 164.]

But we have not recognised the right of the plaintiffs here, except as taking subject to the conditions of the original contract. The document signed by Lyall was merely a fresh delivery order, and created no estoppel—See *Farmeloe* vs. *Bain*, L. R., 1 C. P. D., 445.

[PONTIFEX, *J.*—That case does not apply. There is a clear distinction between a fresh delivery order to the original vendee, and one to a third person.]

(The cases of *Merchant Banking Co.* vs. *Phœnix Bessemer Steel Co.*, L. R., 5 Ch. D., 205, and *Imperial Bank* vs. *London and St. Katherine Docks Co.*, ib., 195, were also referred to.)

As to effect of the doctrine of estoppel the Court can only look to the Evidence Act.

The only estoppels now in force in British India are those to be found in sections 115 to 117 of that Act; for by section 2 of the Act, all rules of evidence, except those in the Act itself, are excluded.

Phillips (on same side).—The essence of the doctrine of estoppel is that the person must have acted upon the circumstances which are set up as an estoppel. Here the plaintiffs must prove an express contract based upon something done by the defendants and entitling them to bring this suit.

They alleged in their plaint an express contract on the part of the defendants. This they have not proved.

The cases of *Dixon* vs. *Yates*, 5 B. & Ad., 313; *MacEwan* vs. *Smith*, 2 H. of L. Cases, 309; *Griffiths* vs. *Perry*, 1 E. & E., 680; *Stweld* vs. *Hughes*, 14 East., 308; and *Pearson* vs. *Dawson*, 1 E. B. & E., 448, were all cases of dealings upon credit or acceptance of bills, where the immediate buyer was entitled to delivery without payment. There the vendor had to give up nothing.

[PONTIFEX, *J.*—In those cases the original right of lien was given up.]

The plaintiffs seek to substitute an entirely new contract by estoppel. Their witnesses were disbelieved, and if they have failed to prove an express contract to deliver without payment, they ought not to be allowed to have the benefit of an estoppel from our conduct.

The cases of *Knight* vs. *Wiffen*, L.R. 5 Q. B., 660, and *Woodley* vs. *Coventry*, 2 H. & C., 164, seem to be against us, but it does not appear there that the goods were not sold on credit. The question was not raised.

The Counsel for the respondents were not called upon.

The judgment of the Court (1) was as follows :—

We think that the lower Court has taken a correct view of this case.

The plaint does not very correctly describe what the true cause of action is against the defendants; but the evidence is conflicting, and the circumstances peculiar; and we think that the learned Judge was fully justified in giving the plaintiffs a decree for what really appears to be their due.

The facts, as we consider them to be proved, are these :—

Messrs. Cohen Brothers had contracted with the defendants to buy of them a large number of gunny bags in the months of April and May 1878.

The time for taking delivery of these bags had been extended at the request of Messrs. Cohen; and on the 22nd July there remained 101,500 bags still undelivered.

The defendants had been pressing Messrs. Cohen to take delivery of these bags; and on the last-mentioned day Mr. Cohen, a member of the firm, called at the office of Messrs. Macneill & Co., the defendants' agent. He informed them that he had arranged to take delivery of 51,500 bags, and he then made a further contract for the purchase of 30,000 twilled bags.

Accordingly, on the following morning, the 23rd July, the defendant Company sent to Messrs. Cohen delivery orders for

(1) GARTH, *C.J.*, and PONTIFEX, *J.*

1880

GANGES MANUFACTURING CO. v. SOORUJMULL.

Judgment.

the 51,500 bags and also for the 30,000 twilled bags sold on the previous day.

On the afternoon of that day Mr. Cohen again called at the office of Macneill & Co., and saw Mr. Lyall, who had the conduct of their business as the agents of the defendants.

According to Mr. Lyall's own evidence, Mr. Cohen on this occasion handed him an open letter from Cohen Brothers to Macneill & Co. in the following terms:—

MEMORANDUM.

23*rd July* 1878.

From
COHEN BROTHERS & Co.,
11, *Radha Bazar Lane*,
CALCUTTA.

To
MESSRS. MACNEILL & Co.,
Agents, Ganges Jute Company.

DEAR SIRS,

With reference to your delivery orders, Nos. 45 to 52 for 51,500 C bags, and Nos. 53 to 55 for 30,000 H twills, we have handed the delivery orders to Baboo Roop Chand Somair Mull, to whom you will please deliver the bags as may be required.

Yours faithfully,
COHEN BROTHERS & Co.

Mr. Cohen said that he had made arrangements to take the bags, for which they had received the delivery orders, but that he wished Macneill & Co. to deliver them to a person, whom he had brought with him, the witness Ramrutton, who in fact represented the plaintiffs. He then went and fetched Ramrutton into the room, and pointing to him said, that he was the man whom he wanted to have the bags delivered, and begged Mr. Lyall to write to the Manager to that effect. Mr. Lyall said that there was no necessity for such a letter, but if he wished it he would give one.

He then proposed merely to initial the open letter, but Mr. Cohen said that that would not be enough, because he wished the bearer personally to get delivery, and thereupon Mr. Lyall wrote these words upon the letter—"the bearer this will personally take delivery of each lot as required."

Mr. Lyall states that he had no conversation with Ramrutton and that this was substantially all that passed.

Ramrutton, on the other hand, says that he told Mr. Lyall that Roop Chund Soorjo Mull, one of the plaintiffs, wanted the paper signed by Mr. Lyall as a guarantee for the 87,500 bags, and that if he signed it, the plaintiffs would advance Rs. 15,000 to Cohen; so that, according to his evidence, Mr. Lyall had notice of the whole arrangement between the plaintiffs and Messrs. Cohen.

This part of Ramrutton's statement however the learned Judge in the Court below has disbelieved, and we are not disposed to question the correctness of his finding in that respect.

Mr. Lyall, on the other hand, states that he believed Ramrutton to be merely a servant of Messrs. Cohen, and that the only reason why he was asked to sign the letter was in order to secure the delivery of the bags to that particular man. But this statement of Mr. Lyall's really amounts to nothing. What was said and done on this occasion is of course evidence, but what was passing in Mr. Lyall's mind is no evidence as against the plaintiffs.

We are bound to put a reasonable construction on what occurred, and to view the transaction as Mr. Lyall himself, being a mercantile man, and a man of business, ought to have regarded it; and dealing with it in that way, it seems to us quite impossible to accept the explanation which Mr. Lyall himself and the appellant's Counsel have endeavoured to impress upon us.

It is obvious that Ramrutton was introduced to Mr. Lyall, not as a servant of Cohen and Company, but as a third person, to whom he desired Mr. Lyall to transfer the right of taking bags under the delivery orders. Messrs. Cohen had experienced great difficulty in taking delivery of these bags; it is pretty clear that this difficulty arose from their not being in a position to pay for them; and the fact of Ramrutton being introduced, and of Messrs. Macneill *being asked as a favor to make a special order for the delivery of the bags to him*, was quite sufficient, as it seems to us, coupled with the other circumstances of the case, to have fully apprised Mr. Lyall of what he was really asked to do.

The delivery orders, which had been sent on the morning of the 23rd, would have enabled any servant of Messrs. Cohen to

1880

GANGES MANUFACTURING CO. v. SOORUJMULL.

Judgment.

obtain delivery of the goods upon paying for them. It would have been quite unnecessary to ask Mr. Lyall *as a favor*, to deliver the goods to any of Messrs. Cohen's servants, and Mr. Lyall knew that perfectly well. The favor which Mr. Cohen asked was to obtain an order for delivery to the plaintiffs, with whom he was making the arrangement; and we think that Mr. Lyall must, or ought to, have known that this was Mr. Cohen's intention.

Certain it is, that upon the faith of the order, which Mr. Lyall signed for the delivery of the goods to Ramrutton, the plaintiffs were induced to, and did actually advance Rs. 15,000 to Messrs. Cohen on that same day; and the larger portion of the goods was, in fact, afterwards delivered to the plaintiffs under that order without their being required to pay for them.

The case, therefore, appears to us to come clearly within the principle of the authorities, which were acted upon by the learned Judge, and especially the two cases of *Knight* vs. *Wiffen*, (L. R. 5 Q. B., 660), and *Woodley* vs. *Coventry*, (2 H. and C., 164). In the latter case, the defendants, who were warehousemen, had sold to a Mr. Clark a portion of a large quantity of flour which was lying at their warehouse, without making any appropriation to him of any particular barrels. Mr. Clark then sold to Messrs. Woodley, the plaintiffs, a portion of that flour, and gave them a delivery order for it, which delivery order was taken to the defendants, who said that "*it was in order*," and subsequently delivered to the plaintiffs a portion of the flour. Clark then became insolvent, and the defendants refused to deliver to the plaintiff the remainder of the flour. But it was held that, as the defendants had consented to the transfer, and had thereby induced the plaintiff to act upon it, it was not competent to them to recede from their word, or to repudiate the transfer which they had been the means of confirming.

In that case, as in this, no actual appropriation of the goods had been made to the original purchaser; and the point was taken, as it has been here, that, as there had been no severance of the particular goods, no property in them had passed to the vendor; but the Court considered that as the delivery

ad been assented to by the defendants, the latter were estopped om denying that they held goods answering to the description n those orders at the disposal of the person to whom the orders ere given.

The case of *Knight* vs. *Wiffen* is to the same effect, and there so no appropriation of the goods had been made to the original rchasers at the time of the transfer.

It has been further contended by the appellants, that sections 15 to 117, contained in Chapter VIII. of the Evidence Act, lay wn the only rules of estoppel, which are now intended to be force in British India; that those rules are treated by e Act as rules of evidence, and that by section 2 of the Act l rules of evidence are repealed, except those which the Act ntains.

But if this argument were well founded, the consequences ould indeed be serious. The Courts here would then be de-rred from entertaining any questions in the nature of estoppel, hich did not come within the scope of sections 115 to 117, wever important those questions might be to the due adminis-ation of the law.

The fallacy of the argument is in supposing, that *all rules of toppel* are also *rules of evidence*. The enactment in section 115 no doubt in one sense, a rule of evidence. It is founded upon e well-known doctrine laid down in *Pickard* vs. *Sears* (6 Ad. d E., 469) and other cases, that where a man has made a presentation to another of a particular fact or state of circum-ances, and has thereby wilfully induced that other to act upon representation, and to alter his own previous position, he is topped, as against that person, from proving that the fact or ate of circumstances was not true. In such a case the rule estoppel becomes so far a rule of evidence, that evidence is admissible to disprove the fact or state of circumstances hich was represented to exist.

But "estoppels," in the sense in which that term is used in lish legal phraseology, are matters of infinite variety, and by no means confined to the subjects which are dealt with in p. VIII of the Evidence Act.

man may be estopped not only from giving particular

1880

GANGES MANUFACTURING CO. v. SOORUJMULL.

Judgment.

evidence, but from doing any act or relying upon any particular argument or contention—which the rules of equity and good conscience prevent him from using as against his opponent.

A large number of cases of this kind will be found collected in the notes to *Doe* vs. *Oliver*, 2 Smith's Leading Cases, 6th Ed., pp. 772 *et seq*; and whatever the true meaning of section 2 of the Evidence Act may be as regards estoppel, we are clearly of opinion that it does not debar the plaintiffs in this case from availing themselves of their present contention as against the defendants.

When once Mr. Lyall had consented to the transfer, which had been made to the plaintiffs by his instrumentality, and had placed it in the power of Messrs. Cohen to obtain an advance from the plaintiffs on the strength of it, it would clearly be inequitable to allow the defendants to recede from the arrangement which had been made by their agent Mr. Lyall.

Holding, therefore, as we do, that the judgment of the Court below was right on principle, there was no contention on the part of the appellants, that the amount of the damages was erroneously estimated.

The appeal will, therefore, be dismissed with costs.

[FULL BENCH.]

I. R. RAINEY AND OTHERS . . (PLAINTIFFS) APPELLANTS; 1879 December 8th.

AND

NOBO COOMAR MOOKERJEE AND OTHERS . . . . . } (DEFENDANTS) RESPONDENTS. No. 115 of 1878.

Limitation Act, IX of 1871, *section* 3—*Majority—Domicile.*

For the purposes of the Limitation Act, IX of 1871, no person, whatever his domicile may be, is protected from the operation of the Act beyond the age of 18, and the three years of grace given by that Act.

REGULAR APPEAL from a decision passed by the Subordinate Judge of Jessore.

The case was referred to a Full Bench by Mr. Justice JACKSON and Mr. Justice MCDONELL with the following expressions of opinion :—

JACKSON, *J.*—In this case the question arises whether with reference to the Indian Succession Act, and other enactments here in force, the children by marriage of a British subject born in Europe but married and domiciled in this country, themselves also having no other than an Indian domicile, and the Indian Majority Act, IX of 1875, not applying to them, attain their majority at the age of 18 years, or at that of 21 years.

There is a decision on this point on the original side of this Court by Mr. Justice MARKBY—*Roelo* vs. *Smith* (1 B. L. R., O. C., 10) as to the correctness of which I am not satisfied, and as the point is of great importance, I think it should be determined by a Full Bench.

MCDONELL, *J.*—I concur in thinking that the point ought to be decided by a Full Bench.

Woodroffe, and Mr. *Gregory*, for the Appellants.

Phillips, Baboo *Gooroodas Banerjee*, and Baboo *Bungsheedhur Sen*, for the Respondents.

The decision of the Full Bench (1) was follows :—

As the question referred to us in this appeal arises upon the issue of limitation, we think that it must be determined with

(1) GARTH, *C.J.*, JACKSON, PONTIFEX, MORRIS, and MCDONELL, *J.J.*

1879

RAINEY v. NOBO COOMAR MOOKERJEE.

Judgment.

reference to Act IX of 1871, that being the Limitation Act which was in force at the time of the institution of the suit.

If the plaintiff, Isabella Rainey, came of age at 21, the suit is in time, having been brought within three years of her attaining that age. But if she came of age at 18, the suit is barred.

Now the third section of the Limitation Act of 1871 distinctly says that in that Act, unless there is something repugnant in the subject or context, minor means "a person who has not completed his age of 18 years."

There is no distinction here between persons of different races or nationality, nor can any question arise, as far as we can see, of domicile or place of residence.

We can only read the third section as meaning, that for the purposes of the Limitation Act of 1871, no person, whoever he may be, is protected from the operation of the Limitation Act beyond the age of 18, and the three years of grace given by that Act.

As we decide this case upon the provisions of the Limitation Act, we think it unnecessary to consider the question of the plaintiff's domicile.

[CIVIL APPELLATE JURISDICTION.]

ıRUT CHUNDER ROY (PLAINTIFF) . . APPELLANT;

AND

ıI DASS DEY . . . . . RESPONDENT.

1880
Feby. 21*st.*

No. 331 of 1879.

Enhancement of rent—Parties—Co-sharers.

A suit by one of several co-sharers for enhancement of the rent of is own share will not lie, although he may have been in the habit of ecovering the rents of his own share separately, and have joined his -sharers as defendants.

Sheikh Guni Mahomed vs. *Moran*, and *Doorga Prosad Mytee* vs. *oynarain Hazrah*, 2 Cal. L. R., 370, S. C., I. L. R., 4 Cal. 96 followed. ee also *Rajendro Narain Biswas* vs. *Mohender Lall Mitter*, 3 Cal. . R., 21.

PEAL from a decision of the Subordinate Judge of Jessore, sing the decree of the Moonsiff of Baghaut.

e plaintiff here sought to recover from the first seven dants arrears of rent at an enhanced rate, notice of the ded enhancement having been previously duly served upon . The other defendants were the plaintiff's co-sharers in the in question.

e plaintiff had been in the habit of recovering the rents of ıare separately.

e Moonsiff gave the plaintiff a decree, as prayed for, but in ıl his decision was reversed by the Subordinate Judge, where- the plaintiff preferred a second appeal to the High Court.

boo *Mohit Chunder Bose*, for the Appellant.

boo *Doorga Mohun Dass*, and Baboo *Kali Charan Bannerjee*, ıe Respondents.

e judgment of the High Court (1), which was as follows, was ıred by

ION, *J.*:— JACKSON, *J.*

e present suit was brought by the plaintiff who is sharer in a certain Khas Chuck in the Soondurbuns

(1) JACKSON and TOTTENHAM, *J.J.*

1880

BHARUT CHUNDER ROY v. KALI DASS DEY.

Judgment.

JACKSON, J.

against the defendants Nos. 1 to 7 as principal defendants and under-tenants, and against defendants Nos. 8, 9 and 10 who appear to have been co-sharers in the Chuck, for the purpose of obtaining from the principal defendants arrears of rent at an enhanced rate agreeably to notice. It is alleged—and for the purposes of this appeal we may assume it to be correct—that the plaintiff had previously been accustomed to recover rent separately from his co-sharers.

The defendants raised various pleas. The first of them was, that the suit was improperly framed as being a suit to enhance the rent of a moiety of the defendants' tenure. That question was embodied in the second of the four issues framed in the Court of first instance, "whether the plaintiff, being one of several proprietors, can bring a suit for enhancement of rent."

The Moonsiff's decision upon the point was in these words: "The objection of the defendant has no weight, inasmuch as the plaintiff's co-sharers have been made co-defendants, and it has been proved that the plaintiff has been in the habit of realising separate rents from the defendants. According to the Full Bench case of *Doorga Prosad Mytee* vs. *Joynarain Hazrah*, reported in 2 C. L. R., 370, I. L. R., 4 Cal., 96, the plaintiff, who is one of the several proprietors, having made separate collection of rent, can sue for enhancement of rent." In that way the Moonsiff very shortly states what he considers to be the effect of the Full Bench ruling, and then he passes on to another part of the case. The result was, that he gave the plaintiff a decree for rent at Rs. 261 with costs. The defendants appealed, and the appeal coming before the Subordinate Judge, he says this:—"This appeal, and appeal No. 53 being of the same nature, have been tried together, according to the Full Bench rulings of the Honorable High Court, as noted in the margin. (*Sheikh Guni Mahomed* vs. *Moran*, and *Doorga Prosad Mytee* vs. *Joynarain Hazrah*, 2 C. L. R., 370, I. L. R. 4 Cal., 96.) The plaintiff is not entitled to sue to enhance the rent in respect of 8 annas share out of the whole 16 annas of a talook. According to the purport of those precedents the plaintiff's claim being deemed fit to be dismissed, it is ordered that the appeals be decreed, &c."

Now, it must be admitted, that this was not a satisfactory judgment; because the Moonsiff, having apparently had the very same decisions before him, and having held upon those rulings that the plaintiff was entitled to succeed, the Appellate Court ought certainly to have pointed out where the Moonsiff's error lay, and ought to have shown how it held that the plaintiff's suit must fail. It happens, however, that the lower Appellate Court is right in fact, but in consequence of its omission it becomes necessary for us to point out how it is that the plaintiff's suit must fail. The cases before the Full Bench were referred with two specific questions:—Firstly, "whether the izaradar of a co-sharer of an undivided estate, who has made separately collections from the tenants of the whole estate in respect of his share, can sue to obtain a kubooleut at an enhanced rent for his share of the tenure, the other co-sharers not being made parties to the suit." Secondly, "whether the izaradar of a co-sharer of an entire tenure, who has for some time realized his rent separately in respect of his share, can sue to enhance the rent of that share separately, without joining the other co-sharers of the tenure." No doubt in these two questions it was assumed that the other co-sharers had not been made parties to the suit, and as the judgment of the Full Bench commences with the statement, "we think that both questions referred to us should be answered in the negative," it may be that the Moonsiff considered that the plaintiff, as he had been in the habit of realizing separate rent, and as he had made his co-sharers parties to the suit, might recover. But if he had read the judgment carefully, he would have found that the learned Judges of the Full Bench went beyond the questions referred to them, and laid it down distinctly that such a suit as the present could not be brought. "The right of one co-sharer," they observed, "to enhance the rent of his share must be governed by the same principles as his right to a kubooleut. The Rent Law, in our opinion, does not contemplate the enhancement of a part of an entire rent, and the enhancement of a separate share is inconsistent with the continuance of the lease of the entire tenure." Now, there is no allegation, as I understand, in this case, that the lease of the entire tenure under which the defendants held, had come to an end, so that that state

1880

of things had not been brought about in which the under-tenants and the separate co-sharers were at liberty to enter into divers separate contracts. As far as we can see in this case, the tenure, as originally created, still subsists. The only modification of it is, that by the course of dealing between the parties, the plaintiff has been accustomed to recover his share of the rent separately. Therefore, if there was any wish on the part of the plaintiff or any other party to the contract to vary its terms, that could have been done by bringing the whole of the parties before the Court, and bringing the contract, as a whole, before the Court. The plaintiff is not at liberty to bring a suit merely to enhance his share of the rent. We think, therefore, that the Full Bench ruling does apply to the facts and circumstances of this case, and that the appeal must be dismissed with costs.

[FULL BENCH.]

February 2nd.

No. 1775 of 1878.

JOGGOBUNDHU MUKERJEE AND OTHERS . . . . (PLAINTIFFS), APPELLANTS;

AND

RAM CHUNDER BYSACK . . (DEFENDANT), RESPONDENT.

Limitation—Symbolical possession—Civil Procedure Code (Act X of 1877), section 224.

Where a plaintiff has obtained a decree for possession of immoveable property which is in the occupation of ryots, and in execution thereof has been put in symbolical possession in the manner prescribed by section 224 of the Code of Civil Procedure, he is entitled to maintain a suit against the defendant for the recovery of the same land within 12 years from the date of such symbolical possession.

APPEAL from a decision passed by the Judge of Dacca, affirming the decree of the Subordinate Judge of that district.

This case was referred to a Full Bench by Mr. Justice JACKSON and Mr. Justice MCDONELL with the following remarks:—

In this case a question arises in regard to which there is a conflict of decisions.

The same question arose at the hearing of the case of *Umbica Churn Gupta* vs. *Bholanath Ghosal*, 4 C. L. R., 55; and I

1880

JOGGO-BUNDHU MUKERJEE v. RAM CHUNDER BYSACK.

Statement.

e to think that at the time of the hearing of that case the l Judges who heard it found themselves in the presence e conflict, or at any rate, by their decision, constituted ict of opinion.

the case now stands, it appears to me that we have oice but to refer the matter for the decision of a Full

question is, whether the plaintiff having obtained a for possession of immoveable property which is in the tion of ryots, and having obtained the kind of delivery bed by the code in such cases, viz., by proclamation, and ving in any other mode obtained actual possession, obtains y a fresh period of limitation, that is to say, is entitled intain a suit for the recovery of the same land within 12 rom the date of such proclamation.

cases out of which the conflict may be said to arise are —For Appellant: *Gunga Gobind Mundul* vs. *Bhopal r Biswas*, 19 W. R., P. C., 101; *Rubia Khanum* vs. *Wise*, R., 329; *Koonjo Mohun Dass* vs. *Nobo Coomar Shaha*, R., 4 Cal., 216; *Umbica Churn Goopto* vs. *Bholanath* , 4 Cal. Rep., 55. For Respondent: *Sreemutty Nubo* vs. *S. M. Seetamonee*, 23 W. R., 407; *Moonshee Jowhur Baboo Ram Chand*, 24 W. R., 418; *Mohomed Arab* vs. *Buksh*, 25 W. R., 127; *Manoka* vs. *Jugut Chunder Rukit*, ne's Rep., 131; and the material point for consideration ection with these cases is, whether the words contained judgment of the Judicial Committee of the Privy Council at is called the Mundal's case, and which is reported in 19 , page 101, are to be taken as an exposition of the law lly, or are to be considered with reference to the facts record of that case.

ill be observed that Mr. Justice MARKBY considered that 24 W. R., page 418, enquired into the facts of it, and o the conclusion that the judgment must be interpreted ference to the facts so happening.

o *Nulit Chunder Sen*, for the Appellants.

son, and Baboo *Lall Mohun Dass*, for the Respondent.

1880

JOGGO-BUNDHU MUKERJEE v. RAM CHUNDER BYSACK.

Judgment.

The judgment of the Full Bench (1) was as follows :—

If we were satisfied that in the Mundal's case their Lordships of the Privy Council intended to decide the question which is now referred to us, it would, of course, have been unnecessary to consider the matter further.

But upon a careful perusal of their Lordships' judgment, and on referring to the facts as they appear in the copy of the printed book, we much doubt whether the point was really raised in that case, or whether their Lordships intended to express any opinion upon it.

We have, therefore, now to decide the matter without reference to their Lordships' judgment; and having considered the sections of the Code which bear upon it, and the somewhat contradictory decisions to which we have been referred during the argument, we have come to the conclusion that the question of law referred to us should be answered in the affirmative.

Sections 223 and 224 of the Code point out the mode of executing decrees in suits for immoveable property; section 223 where the land is in the actual possession of the defendant applies; section 224, where it is in the occupation of ryots.

In the one case the delivery of the land is to be made by placing the plaintiff in direct possession. In the other the delivery is effected by the officer of the Court by going through a certain process prescribed by section 224, and proclaiming to the occupants of the property that the plaintiff has recovered it from the defendant.

This is the only way in which the decree of the Court, awarding possession to the plaintiff, can be enforced; and as in contemplation of law both parties must be considered as being present at the time when the delivery is made, we consider that, as against the defendant, the delivery thus given must be deemed equivalent to actual possession.

As against third parties, of course, this symbolical possession (as it is called) would be of no avail, because they are no parties to the proceeding. But if the defendant should, after, again dispossess the plaintiff by receiving the rents and p

(1) GARTH, *C.J.*, JACKSON, PONTIFEX, MORRIS and McDONELL,

1880

JOGGO-BUNDHU MUKERJEE v. RAM CHUNDER BYSACK.

Judgment.

we think that the plaintiff would have 12 years from such dispossession to bring another suit.

One very conclusive test, as it seems to us, that the delivery thus effected under section 224 does really, in the eye of the law, place the plaintiff in possession as against the defendant, consists in this:—That if mesne profits are awarded to the plaintiff, he is only entitled to them up to the time when delivery is given. This can only of course be explained upon the ground, that, at that time, the defendant's possession is considered at an end, and the transfer to the plaintiff becomes complete.

We think, therefore, that the judgment of the lower Appellate Court, upon the question of limitation, must be reversed, and that the case should be remanded to that Court to be tried upon its merits.

The costs in this Court will abide the result.

[CIVIL APPELLATE JURISDICTION.]

January 6th.

No. 112 of 1878.

NUFUR DAS ROY AND ANOTHER . (PLAINTIFFS) APPELLANTS;

AND

MODU SOONDARI BARMONIA (DEFENDANTS) RESPONDENTS.

Hindu Law—Surrender by Hindu Widow to heirs—Reversioners.

The surrender by a Hindu widow or mother to persons, who at the time are the heirs by Hindu Law of the person from whom she has inherited, vests in those persons the inheritance which they would have taken if she had died at the time of such surrender.

Shama Soonduree vs. *Shurut Chunder Dutt*, 8 W. R., 500; and *Gunga Pershad Kur* vs. *Shumbhoonath Burmun*, 22 W. R., 393, followed. See *Rajbollobh Sen* vs. *Omesh Chundro Rooj*, 3 C. L. R., 384.

REGULAR APPEAL from a decision passed by the Subordinate Judge of Moorshedabad.

In this case the plaintiffs, Nufur Das Roy and Surjo Narain Roy, sued to recover possession of certain properties by right of inheritance.

Jugomohun Maheta, the common ancestor of the plaintiffs and the defendant, died on the 12th Aughran 1243, possessed of the properties in suit, and leaving him surviving two widows, Khu-

1880

NUFUR DAS ROY v. MODU SOONDARI BARMONIA.

dunmoni and Lukhimony, and three sons by the former, viz., Kedarnath, Dwarkanath and Mathuranath, and three daughters by the latter. At the time of her husband's death, however, Lukhimony was *enciente*, and subsequently gave birth to a son Mul Chand, who died in infancy.

Argument.

The plaintiffs were the sons of the eldest of the three daughters. The defendants were the widows of Kedarnath and Dwarkanath. Mathuranath died a minor.

Lukhimony, it seems, had executed a deed (called a willnamah,) on the 29th Srabun 1265, by which she transferred the whole of the property in her hands and coming from her husband, to Kedarnath and Dwarkanath.

The plaintiffs contended that this document which had been executed without their consent, was not binding beyond the life of Lukhimony, and that on her death they were entitled to succeed to Mul Chand's share in the property as his preferential heir.

The defendants contended that the willnamah was a *bonâ fide* document, and that under it and a subsequent ekrar, by which it was in substance re-affirmed, the whole of the properties had been transferred absolutely to their husbands as the principal reversionary heirs of Jugomohun Maheta. They further contended that no share in the properties had ever vested in Mul Chand, and that his mother Lukhimony never had any right in such properties as heiress of her son.

The Subordinate Judge was of opinion that the consent of a daughter's sons was not necessary to effectuate a cession by a grandmother to her stepsons who were the first reversioners, and that the cession was valid. He accordingly dismissed the suit.

The plaintiffs appealed to the High Court.

J. D. Bell, Baboo *Mohesh Chunder Chowdhry*, and Baboo *Gur Dass Banerjee*, for the Appellants.

Baboo *Anoda Prosad Banerjee*, Baboo *Sree Nath Dass*, Baboo *Rash Behary Ghose*, and Baboo *Bunshee Dhur Sen*, for the Respondents.

J. D. Bell contended that the evidence was insufficient to show that Lukhimony intended to alter the course of succession, and that the onus was upon the defendants to show the

quishment by her was sufficient to defeat the claims of the plaintiffs. The authorities showed that where there were heirs of different degrees living, it was necessary, in order that such a relinquishment as that made by Lukhimony should be binding on all of them, that all of such heirs should consent thereto—*Ameena Khaton* vs. *Radhabinode Misser*, 12 S. D. A., 1856, p. 596. See Mayne's Hindu Law, section 547.

The question here was covered by the cases as to alienations by Hindu widows.

[JACKSON, *J.*—It is not a mere question of alienation, but rather a question of surrender, or of restoring the property to its original channel. Such a surrender by a Hindu widow to those next entitled is looked upon in Hindu law as a meritorious act.]

All that was decided in the case of *Sreemutty Jadomony Dabee* vs. *Sarodaprosad Mookerjee*, 1 Boul., 121, was that the heir of a reversioner consenting to a surrender by a Hindu widow could not afterwards impeach the transaction.

The Privy Council case of *Lalla Kundu Lall* vs. *Lalla Kalee Pershad*, 22 W. R., 307, was decided upon a different ground, namely on the principle of family arrangement. The case which had gone farthest against his contention was that of *Gunga Pershad Kur* vs. *Shumbhoonath Burmun*, 22 W. R., 393, but it was at variance with the case of *M. S. Radha* vs. *Mussamut Kour*, W. R., Gap No. 148. The latter case, however, was a case of sale.

[Baboo *Unnoda Prosad Banerjee*.—The case in 22 W. R., 393, has been affirmed on appeal.]

The case of *Rugonee Kant Mitter* vs. *Prem Chand Bose*, Marsh., 241 (afterwards reversed by the Privy Council on a different point, see L. R. 2 I. A., 113) whereupon a disclaimer by two childless widows who had a life interest, the immediate reversioner was allowed a decree for possession of a share of a joint family against certain person who had denied his right, is not quite in point.

In second appeal No. 1197 of 1878 (MORRIS and PRINSEP, *J.J.*,) conveyance with the consent of the nearest heirs was held to be valid as against other reversioners.

Baboo *Mohesh Chunder Chowdhry* on the same side urged that

1880

NUPUR DAS ROY v. MODU SOONDARI BARMONIA.

acceleration of the inheritance could only take place when the mother was civilly dead. Dayabhaga, section 1, para. 5; see *Nobin Chunder Chuckerbutty* vs. *Issur Chunder Chuckerbutty*, 9 W. R., 508, where the principle upon which succession to a widow takes place is shown.

Judgment.

[JACKSON, *J.*—The recent cases cited by Mr. Bell are against you. You must distinguish these cases.]

In the present case there was no voluntary surrender. The surrender was by way of compromise arising out of a dispute in which she was unable to withstand the claims made by Dwarkanath and Kedarnath.

Baboo *Unnoda Prosad Banerjee* was heard upon a cross-appeal on other grounds.

J. D. Bell in reply.

The judgment of the Court (1), which was as follows, was delivered by

JACKSON, *J.* JACKSON, *J.*:—

There are two principal questions raised on the appeal of the plaintiffs in the present suit,—one of them relates to an issue of fact, the other to a question of law. The plaintiffs contend that the Court below has come to an erroneous conclusion as to the circumstances under which a deed called a willnamah, which was afterwards in substance affirmed by a document called an ekrarnamah, was executed by Lukhimony Dossee, the widow of Jugomohun who, as mother, inherited from her infant son Mul Chand. The learned Counsel who appeared for the appellant contended that upon the evidence it ought to have been held that this instrument was executed by Lukhimony upon imperfect information and understanding; that she was not fully aware of her rights or fully cognizant of the nature of the act which she was doing and the rulings of this Court and of the Privy Council in regard to sales and other acts by purdah nisheen ladies were referred to. It appears to me that the case stands quite apart from the ordinary cases of that kind; because this was no sale or parting with the rights of the lady in favor of strangers. It was an act of an entirely different description. It was one by which

(1) JACKSON and TOTTENHAM, *JJ.*

1880

NUFUR DAS ROY v. MODU SOONDARI BARMONIA.

Judgment.

JACKSON, *J.*

ssed, being in possession of certain property by a title very common in Hindu families unhappily, and which is understood, to surrender up properties which she so persons who were then the known heirs both of her own and of her son Mul Chand, that is to say, sons of her by a second wife. Not only did she survive, about years, the execution of this instrument and during all abstain from making any protest or complaint upon ct, but she was actually examined as a witness in Court d to family affairs and inheritance, and in the course of mination she referred to having executed this instrument. that the plaintiffs in this case were no parties to the ngs in which that examination was given, but it so that the plaintiff Nufur Das Roy was present, in fact luced and identified Lukhimony, on that occasion and bly heard her make that statement. But without using ely in the nature of evidence, that is to say, without er statement as evidence, although Mr. Bell does not object to their being so used, it is a very remarkable conduct on her part, and may very well be referred to in of the argument that she knew perfectly what she was hat she executed this instrument and acquiesced in it remainder of her life. Therefore, I see no ground to the so-called willnamah on the ground that this lady was of its contents and was misled into executing it. In to her not being properly advised, she had her own w, and it appears that other respectable persons to whom ly was in the habit of resorting for such purposes were Something has been said as to the son-in-law being at e in a frame of mind which disqualified him from giving but I find much difficulty in attaching weight to the on that point.

ext question is as to the effect of the willnamah and its

On that part of the case, I think it sufficient for us to decided cases in our own Court, in which this very s been raised. Those cases appear to me to be absolutely ve on the question so far as we are concerned. One is a 8 W. R., 500—*Shama Soonduree* vs. *Shurut Chunder Dutt*,

1880

NUFUR DAS ROY v. MODU SOONDARI BARMONIA.

Judgment.

JACKSON, *J.*

in which the judgment was delivered by myself, but in which I had the assistance and concurrence of my lamented colleague, Mr. Justice DWARKA NATH MITTER. In a case turning upon a moot point of Hindu law, I need hardly say that it is the assent of Mr. Justice DWARKA NATH MITTER, which gives its chief value to that judgment. Then in addition we have a quite recent case in 22 W. R., 393—*Gunga Pershad Kur* vs. *Shambhoonath Burmun*, decided by Mr. Justice ROMESH CHUNDER MITTER. In both these cases it is held that surrender by a Hindu widow or mother (for the two cases I think are not distinguishable) to persons who at that time are unquestionably the heirs by Hindu law, of the person from whom she has inherited, vests in those persons the inheritance which they would take, if she at that time were to die. This is a conclusion which, to my mind, is so desirable, and it seems to me so consistent with the general principles of the Hindu Law and with the state of the Hindu society, that I should not be inclined to come to any other conclusion unless the necessity for it were very strongly made out. That being so, I think the decision of the Court below upon this main part of the case was quite correct, and that the appeal of the plaintiffs on this point should be dismissed.

(The learned Judge then dealt with certain other points raised in the appeal.)

[CIVIL APPELLATE JURISDICTION.]

CHUNDERMONEY DOSSEE AND ANOTHER (DEFENDANTS) . . . . . } APPELLANTS;

AND

HURRY DOSS MITTER AND OTHERS (PLAINTIFFS) . . . . . } RESPONDENTS.

1880
Feby. 3rd

Hindu Law—Devise to Married Women—Absolute Estate.

The rule of Hindu law by which widows take only a qualified estate in their husband's property has no application to a devise under a will to married women.

APPEAL from a decision passed by Mr. Justice WILSON.

The suit was for the construction of a will, upon which several questions arose; but the only points raised in this appeal was under the 11th Clause of the will, which ran as follows:—

11th clause.—Upon the completion of 21 years from my death my executor shall, after setting apart a small portion of my estate for the expenses of the household and for the Devsheva, make a division of the remainder of my estate among, and give the same in equal shares to my grandsons, Sree Soorendro Lall Mitter and Sree Jogendro Lall Mitter and Sree Khogendro Lall Mitter and Sree Gopendro Lall Mitter and Sree Gocoo Lall Mitter and Sree Rakhaldass Mitter and Sree Bepinbehary Mitter and Sree Hurry-dass Mitter, and great grandsons Sree Omrito Lall Mitter, and my grand daughters-in-law Sreemutty Chundermoney Dossee and Sreemutty Kristokullyanee Dossee. Finis.

The judgment of the lower Court, after setting out the will, was as follows:—

I think it clear that the testator did not intend to give a life estate in his property generally to his widow. In the house mentioned he did so intend, and he knew how to express himself. What he purports to give her as to the rest is the power of management, the various particular matters mentioned being only those which are commonly incident to the authority of the manager of a family.

One or other of two things must follow—either there is no effectual gift of the property at all, or else the Will must be read as giving it to

1880

CHUNDER-MONEY DOSSEE v. HURRY DOSS MITTER.

Judgment.

the eleven persons named in the 11th paragraph, though coupling that gift with various restrictions as to the time and manner of enjoyment, and the mode of descent which the law cannot recognise. I think the latter is the true view; and that the proper decree is, that asked by Mr. Montriou, namely, that there be a reference to inquire what provision should be made for the rights under the Will of persons other than sharers on partition; that subject thereto the 11 persons named in the 11th paragraph be declared entitled to equal shares of the estate, the last two taking the qualified estate of females under the Hindu law; and that partition be ordered.

From this decision the defendants Sreemutty Chundermoney and Sreemutty Kristokullyanee Dossee appealed, on the ground that it ought not to have been declared that they were entitled under the Will only to a qualified estate of females under Hindu law, but that it ought to have been held that under the Will they took an absolute estate in their shares in the same way as the male devisees.

Phillips, for the Appellants.

No one appeared for the Respondents.

The judgment of the Appellate Court (1) which was as follows, was delivered by

GARTH, *C.J.* GARTH, *C.J.*:—

We think that a mistake has been made in the Court below, and it has probably arisen in consequence of the point not being sufficiently brought to the attention of the learned Judge when the case was heard.

There seems no reason why under paragraph eleven of the Will, the ladies, Mr. Phillip's clients, should not take an absolute estate in their shares in the same way as the male devisees mentioned in that paragraph. The rule of Hindu law, by which widows take only a qualified estate in their husband's property, has no application to a devise of this kind to married women under a Will; and we think that in this instance the provisions of paragraph 12 of the Will tend still more clearly to confirm our view, that the interest which the ladies take under the devise in question is an absolute one.

The appeal will be allowed, but without costs, as no one appears for the respondents.

(1) GARTH, *C.J.*, and PONTIFEX, *J.*

[CIVIL REFERENCE.]

ISHAN CHANDRA BANERJEE . . . .

AND

LOCHUN GOPE . . . . . .

1880
Jany. 29th.

No. 218 of 1879.

Review of judgment of Court of Small Causes—Act X of 1877, *Chapter XLII—Act XI of* 1865—*Retrial.*

In applications for review of judgments of Courts of Small Causes constituted under Act XI of 1865, the procedure laid down in the rules contained in Chapter XLII of the Code of Civil Procedure (Act X of 1877) is to be strictly followed, without reference to the procedure relating to new trials under section 21 of Act XI of 1865.

REFERENCE submitted by the Judge of the Court of Small Causes at Dacca. The terms of the reference were as follows:—

"In this case an application was made under section 623 of the Code of Civil Procedure to obtain review of judgment passed by this Court.

The application has been made within 90 days from the date of judgment, as required by article 173 of the second schedule of the Indian Limitation Act of 1877; but without the preliminary notice required by section 21, Act XI of 1865, in the case of an application for new trial.

A preliminary objection has been taken to the hearing of the applications, on the ground that no review of judgment can be either applied for or obtained in a case tried under the Small Cause Court Procedure.

Before Act X of 1877 came into operation there was only one process for obtaining a rehearing of a case tried by the Mofussil Small Cause Courts under Act XI of 1865, and that was by a petition under section 21 of that Act.

The new Code of Civil Procedure has made the Chapter on review of judgment applicable to the Mofussil Small Cause Courts also. That being so, I think I should be bound to entertain an application for review of judgment when any of the grounds mentioned in section 623 of the Code are found to exist.

1880

ISHAN CHANDRA BANERJEE v. LOCHUN GOPE.

Judgment.

But the difficulty which has arisen in the case is, that when there is a special Act prescribing a special procedure for a certain class of suits, how far that procedure is intended by the Legislature to be affected or modified by the general provisions of a later general Act, in the absence of any express declaration on the part of the Legislature on that connection.

The provisions of section 21, Act XI of 1865, have not been expressly repealed by Act X of 1877, or by any other Act of the Legislature. * * * * * * * * * * * * * *

The applicants having conformed to the provisions of section 623 of the Civil Procedure Code their application was entertained subject to the opinion of the High Court."

Baboo *Opendro Nath Mitter*, for Petitioner.

The following judgment upon the reference (1) was delivered by

JACKSON, *J.* JACKSON, *J.* :—

We think there can be no doubt upon this question. It appears that by the second schedule of the Code of Civil Procedure, Chapter XLVII, which deals with review of the judgment, is extended absolutely to Courts of Small Causes constituted under Act XI of 1865. It is also true, as the Judge of Small Cause Court points out, that section 21 of Act XI of 1865 has not been repealed. What will be the effect of the simultaneous retention of that section with reference to new trials is a question which we are not at present called upon to determine. The Legislature unequivocally expresses its intention that the procedure in review of judgment shall be applicable to Courts of Small Causes; and, if so, the Small Cause Court is, of course, at liberty to entertain an application of that sort, and in so doing must proceed strictly under the rules contained in that Chapter and the procedure relating to new trials under section 21 of Act XI is not to be mixed up with those rules.

(1) JACKSON and TOTTENHAM, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

KOONJBEHARI DHUR (DEFENDANT) . . . APPELLANT;

AND

PREM CHAND DUTT (PLAINTIFF) . . . . RESPONDENT.

1880
Jan. 12th.

No. 522 of 1879.

Hindu Law—Widow, Estate of, in property bequeathed or devised by husband—Will—Gift to wife.

According to Hindu Law, by the will of her husband, a widow takes no more absolute right over the property bequeathed to her than she would take over such property if conferred upon her by gift during the lifetime of her husband. In order that she should take a greater interest than a life estate, either by gift or will from her husband, it is necessary that there should be express words in the document giving a heritable right, or power of alienation.

APPEAL from a decision passed by the Additional Judge of the 24-Pergunnahs, reversing the decree of the Additional Subordinate Judge of that District.

This was a suit to establish a lien on one-third share of a garden situate in Mouzah Sitty Oottorparah. The plaintiff alleged that under a will executed by her late husband Eshen Chunder Dutt, his widow Thakomony obtained the one-third share of the garden in question; that she made a bond in his favour for Rs. 1,000, pledging her share in the property by way of security; that he instituted a suit on the Original Side of the High Court and obtained a money decree, in execution of which he had not been able to recover more than Rs. 179-11-6. Hence he brought this suit to establish his lien on the property.

Among other defences set up, it was urged that Thakomony had only a life interest, and that the plaintiff could not establish his lien beyond her lifetime.

There was no express wording in the document to the effect that the one-third share was to be given to Thakomony absolutely. The will commences by reciting that the testator is seriously ill, and has certain property. It then confers a power of adoption on Thakomony, his second wife. It then mentions his two grandsons and continues, "what I shall give to these two

1880

KOONJBEHARI DHUR v. PREM CHAND DUTT.

Argument.

grandsons and what I shall give to others I am writing in the schedule below."

In the schedule in question the shares in different properties are given to the grandsons and to Thakomony—to the latter, among others, one-third share in the garden in question. Other moveable property was also given by the testator to his wife, but as to that property he expressly restrained her from exercising absolute control over it.

Thakomony died two or three years after the execution, and her daughter subsequently sold the property mortgaged by the bond to defendant.

The Subordinate Judge held that Thakomony had only a life estate, inasmuch there was no absolute estate expressly given, while on the other hand from the power of adoption being given, it appeared there was an intention to limit the estate for her life only.

He accordingly dismissed the suit. On appeal, the Additional Judge reversed that decision, and the defendant thereupon appealed to the High Court.

Baboo *Mohiny Mohun Roy*, and Baboo *Ashootosh Dhur*, for Appellant.

Baboo *Guru Dass Banerjee*, and Baboo *Saroda Charan Mitter*, for Respondent.

Baboo *Mohiny Mohun Roy*.—The case of *Tarucknath Sircar* vs. *Prosono Coomar Ghose*, 19 W. R., 48, shows how the will in this case should be construed. There an absolute estate was held to have been given by the testator to his wife, but there were express words conferring an absolute estate—See Tagore Law Lectures for 1878, p. 333. The clause giving Thakomony the power to adopt clearly shows that the gift was limited.—*Soorjeemoney Dossee* vs. *Denobundo Mullick*, 6 Moore's I. A., 550.

[The case of *Tagore* vs. *Tagore*, 9 B. L. R., 377, was also relied upon.]

Baboo *Gurudass Banerjee*.—The words of gift to the widow and to the sons are the same, and must be construed in the same way. The power to adopt is not to be construed as limiting her estate.

[JACKSON, *J.*—But she is morally bound to exercise the power to adopt, and, if she took an absolute estate, there would be nothing left for any son adopted by her.]

No doubt, as a rule, in gifts *inter vivos* the wife does not take an absolute estate. But the same reasons do not apply in case of a will.

The case in 19 W. R., 48, leaves the point open.

In the Privy Council case of *Moulvie Mohamed Shumsool Hooda* vs. *Shewukram*, 22 W. R., 409, there was a clear limitation to a life estate.

The gift must be construed absolutely unless there is a restriction imposed.—Succession Act (X of 1865), section 82.

[JACKSON, *J.*—That section does not apply to wills executed as this was before the Hindu Wills Act.]

Baboo *Mohiny Mohun Roy*, in reply.

The following judgment of the High Court (1) was delivered by

JACKSON, *J.*:— JACKSON, *J.*

We are unable to give the effect to this will which has been given by the lower Appellate Court. The Additional Judge seems to consider that there was nothing to limit or affect the language of the instrument except what he calls the adoption clause. He appears to have left entirely out of sight the common rule of Hindu law, which is that, in respect of gifts by a husband to his wife, she takes immoveables only for her life, and has no power of alienation, while her dominion over moveable property is absolute. This rule is stated in a recent work—The Tagore Law Lecture for 1878, the author of which, Dr. Guru Doss Banerjee, is the Vakeel for the Respondent. We understand it to be a rule of law, well established in this Court, that a Hindu wife takes by a will of her husband no more absolute right over the property bequeathed than she would take over such property if conferred upon her by gift during the lifetime of her husband; and that, whether in respect of a gift or a will, it would be necessary for the husband to give her, in express

(1) JACKSON and TOTTENHAM, *J.J.*

1880

KOONJBEHARI DHUR v. PREM CHAND DUTT.

Judgment.

JACKSON, J.

terms, a heritable right or power of alienation. In the present case the will contains nothing of the sort. It is the will of a Hindu father of a family of respectable position in life, and a man of business. He must be taken to have been well aware of the rules of Hindu law in this particular; and even if, as is clear from the terms of this instrument, he was not a person accustomed to the preparation of legal papers, yet the words necessary to give full interest are very simple and familiar to every one, and there could be no difficulty whatever in his introducing such words in the will. Dr. Bannerjee suggested that the reason arising out of the condition of the Hindu society, which prevents a Hindu wife from taking an absolute interest in the property given by her husband, does not apply in the case of a will because that reason he understands to be that the husband, notwithstanding the gift, in fact reserves to himself a control over the property given. It appears to me that, supposing that to be the reason, it must be founded upon some consideration of the infirmity of the wife, and not of any intention on the part of the donor to resume the property at his own convenience; and if that be the explanation of it, there can be no reason why such control should not be reserved to the male heir of the husband as well as to himself. In fact the rule is, as I have stated, and so far as we can know, I am not aware of any qualification such as is contended for by Dr. Bannerjee.

Another argument is, that by this instrument the property is given to other persons besides the wife, and in respect of all, the same expression "ডিব" is used, and ought to be considered in the same manner. Now, it seems to me, that the general rule of construction is not violated if we suppose that the property given in each case passes to the recipient, qualified by the capacity in each case to take under gift or will, and it differs in the case of a wife from that of other takers. There is not, moreover, any emphatic declaration on the part of the husband to give the property absolutely to his wife. On the contrary, it seems to me that there is internal evidence of his intention that it should not be absolutely given. In the first place, because he gives her power to adopt a son, and if the property was absolutely given to the wife, very little remained to the son to enjoy:

Secondly, because as to the moveable property given he expressly restrains her from exercising absolute control over it. He says that the money which was declared to be her share was not to be taken from the business in which it was invested, but she was merely to enjoy the interest or the profits of it. When he makes this direction or restriction in regard to moveable property, we may well assume that the enjoyment of the immoveable property was left her, subject to the restrictions imposed by the ordinary rule of Hindu Law. I think, therefore, that the Judge was wrong in holding that she became absolutely entitled to this property, and was not competent to mortgage or alienate. The judgment of the lower Appellate Court, therefore, must be set aside, and that of the Subordinate Judge restored with costs. 1880

[CIVIL APPELLATE JURISDICTION.]

BISSONATH DINDA (OBJECTOR) . . . . . APPELLANT; *January 14th.*

AND

No. 51 of 1879.

DOYARAM JANA (PETITIONER) . . . . . RESPONDENT.

Succession Act (X of 1865), section 50—Will—Witness—Signature—Mark.

It is to be implied from the language of section 50 of the Indian Succession Act (X of 1865) that the two attesting witnesses required by that section to an unprivileged will should have seen the testator sign, or affix his mark before they affix their own signatures.

Quære.—Whether it is necessary that the witnesses should affix their actual signatures as distinguished from their marks.—See *Fernandez* vs. *Alves*, I. L. R., 3 Bom., 382.

APPEAL from an order passed by the Officiating Judge of Midnapore.

Baboo *Bhowany Churn Dutt*, for the Appellant.

Mr. *H. E. Mendies*, for the Respondent.

The facts sufficiently appear from the following judgment of the High Court (1), which was delivered by

WHITE, *J.*:—

WHITE, *J.*

This is an appeal against an order of the Judge of Midnapore,

(1) WHITE and MACLEAN, *J.J.*

1880

BISSONATH DINDA v. DOYARAM JANA.

Judgment.

WHITE, J.

granting letters of administration with the will annexed to one Doyaram Jana.

The will purports to be the will of one Soonder Jana, who died on the 29th of May 1878. It is dated and alleged to have been executed on the day previous to his death.

The grant was opposed by the present objector, who is the appellant before us.

Evidence has been given on the execution of the will by six witnesses, of whom five were attesting witnesses to, and one was the writer of the will.

The objector, on the other hand, produced five witnesses, but their evidence of course is of a negative character.

The Judge considered that there was ample direct evidence of the execution of the will, and that the witnesses for the applicant were fairly trustworthy.

The Judge adds:—"There are some discrepancies as to the order in which the signatures (that is) the signatures of the attesting witnesses with reference to the execution of the will by the testator "were affixed, but these are not material."

The discrepancies to which the Judge alludes are looked at by him in the light of their effect upon the credibility of the witnesses; and if they had to be considered by the Court below only for that purpose, we should not have been disposed to interfere with the order of the Judge. But the existence of those discrepancies raises the question whether the requirements of the Indian Succession Act as to the attestation of the testator's signature by two attesting witnesses have been complied with.

The Judge below is of opinion that it is immaterial whether the attesting witnesses sign before or after the testator, provided they sign in his presence.

Now section 50 of the Indian Succession Act does not in so many words prescribe the order in which the signatures of the testator and the attesting witnesses are to be affixed; but we think that it is to be implied from the language there used, and from the order in which the rules for execution are laid down that the Legislature intended that the two attesting witnesses should have seen the testator sign before they affixed their own signatures. The words in the English Wills Act, so far as

relate to the point we are now considering, are in substance the same as those used in the Indian Succession Act, and the English Courts of Probate, in dealing with these words, have held that the testator must sign before the attesting witnesses. See *Cooper* vs. *Bockett*, 3 Curteis' Reports, page 659. A case also has been cited to us from Indian Law Reports, 3 Bom., 382—*Fernandez* vs. *Alves*,—where the Bombay High Court has taken the same view of the law, and our opinion of the law is in accordance with these authorities.

It becomes material, therefore, in the present case to consider whether there is satisfactory evidence that two at least of the attesting witnesses did not sign until after the testator had executed the will. The testator's execution was effected by his touching the pen of the writer who affixed his signature.

The first witness who is examined says in the course of his cross-examination that—"after all the witnesses had written their names, Soonder (*i.e.* the testator) touched the pen. I saw it," and he repeats that statement a little further on, "After the names of the witnesses had been written, the will was read out, after that Soonder touched the pen."

The next attesting witness Tara Prosad Paramanick, in his cross-examination, also states :—"After we had signed, Soonder put his signature."

The third attesting witness says :—"I wrote my name in the presence of Soonder. Soonder *had* touched the pen in my presence."

The use of the pluperfect tense might lead one at first sight to believe that the witnesses intended to imply that the testator touched the pen previous to the witness putting his signature; but a reference which has been made to his deposition in Bengalee shows that no conclusion on the point one way or the other can be fairly drawn from the tense of the verb used by him.

The Judge, on the 26th November 1878, after examining these three witnesses for the applicant, adjourned the case for further evidence until the 9th of December. What further evidence he required is not stated, but it may be presumed that he did not require further evidence for the purpose of satisfying himself as to the order in which the signatures were affixed, because his judgment shows that he considered this point immaterial.

1880

BISSONATH DINDA v. DOYARAM JANA.

Judgment.

WHITE, *J.*

When the hearing was resumed on the 9th December, two other attesting witnesses were examined for the applicant. The first of them, Brojo Mohun Ghorhayi, says, in contradiction of the statement of the first two witnesses, "first Soonder signed, then I signed." The second witness called on the 9th December, Harhu Adak, is only a marksman.

It is not necessary for us to determine on the present occasion whether the signature of the marksman would constitute the signature of an attesting witness within the meaning of the rules in the Indian Succession Act, because from his evidence one can draw no conclusion as to the order in which the signatures were affixed to the will. He merely says: "Soonder Jana signed it, I attested it, I put a mark as my signature."

It is essential to be proved that the will was executed in the manner prescribed by the Indian Succession Act; and the burden of proof rests upon the applicant. He has failed in our opinion to show that the will was duly executed.

The witnesses contradict one another as to the order in which the signatures were affixed; and even if the contradiction could be disregarded, only one of them states distinctly that he signed after the testator.

We have been asked to remand the case for further enquiry, but considering the large number of witnesses examined in the Court below, and how the evidence stands as regards the point in question, we do not think that we ought to accede to the request.

The appeal is allowed, and the order of the lower Court reversed.

As the point was not taken in the lower Court, we make no order as to costs.

[CIVIL APPELLATE JURISDICTION.]

1880

GOCOOL CHUNDER GOSSAMI AND OTHERS (PLAINTIFFS) . . . . . } APPELLANTS;

AND

THE ADMINISTRATOR-GENERAL OF BENGAL (DEFENDANT) . . . . . } RESPONDENT.

Civil Procedure Code (Act X of 1877), section 372—Revivor—Death of Parties—Practice—"Pending Suit."

Where a suit is capable of revival, and there are no parties living whose consent may be obtained, or to whom notice may be given as required by section 372 of the Code of Civil Procedure, the Court may give leave to revive the suit without any such consent or notice.

Per PONTIFEX, *J.*:—A suit in which there has been a decree, that a scheme for the purpose of carrying out certain trusts should be settled, but which scheme has not been proceeded with, may be treated as a pending suit within the meaning of section 372 of the Code.

THIS was a suit for the determination of the rights of the plaintiffs under the will of one Cossinauth Mullick, and it was asked that, if necessary, the estates of Cossinauth Mullick and of his widow Rungamoney Dossee, since deceased, should be administered.

The plaintiffs alleged that they were the sons of Gobind Chunder Gossami, who was a trustee under the will of Cossinauth, which declared that the testator "entrusts as a charge to Sree Gobind Chund Gossami Probhoo Jeo, the grandson in the male line of my Sree Gooroo, and to his son, son's son, and so on in succession: they will perform all those acts as mentioned herein below." The will then provided for the establishment of certain seminaries for the instruction of students, &c., and devised the property of the deceased to the persons abovenamed for the purpose of establishing and maintaining the seminaries.

Rungamoney was appointed executrix and proved the will. In the event of her declining or being unable to undertake the charge or dying, the Administrator-General of Bengal had been by the will appointed executor.

1880

GOCOOL CHUNDER GOSSAMI v. THE ADMINISTRATOR-GENERAL OF BENGAL.

Statement.

Before her death, namely on the 12th March 1879, Rungamoney Dossee transferred the executorship to the Administrator-General under section 31 of Act II of 1874. She died on the 14th April 1879, having made a will, of which she appointed the Administrator-General executor. This will was not set out in the plaint, nor was it alleged that the Administrator-General had proved it.

It appeared that on the 4th of June 1869 Gobind Chund Gossami sued Rungamoney Dossee in the High Court as her husband's executrix for the establishment and construction of the will of Cossinauth Mullick, and for a declaration of the rights of all persons interested therein, and for the execution of the trusts of the will.

A decree was made in that suit on the 6th of December 1869, establishing the will, and declaring that the trusts ought to be performed. The decree directed that a scheme should be settled for the purpose of carrying out the trusts, and enquiries made as to what would be the expense of establishing and maintaining the seminaries; and on the 18th of December 1869 it was decided that, with the consent of the plaintiff, the establishment of one of the seminaries should be postponed, and Rs. 125 a month should be paid for the maintenance of the other, and Rs. 500 for the consecration of a Saligram.

The plaintiff submitted a scheme which was not approved, and the Registrar, under the order of the Court, submitted another scheme; but no further steps were taken to carry out the decree, and the suit was ultimately abandoned and struck off on the 14th August 1875, under a rule of Court passed in that year.

Except so far as the present plaint asks for the administration of the estate of Rungamoney, the prayer was identical with that filed in 1869.

Mr. Justice BROUGHTON dismissed the suit under section 13 of the Civil Procedure Code, as amended by Act XII of 1879, section 6, on the ground that in his opinion the parties in this and the other suit were identical either actually or by representative, and that the matter in issue was also identical. The plaintiffs appealed.

1880

GOCOOL CHUNDER GOSSAMI v. THE ADMINISTRATOR-GENERAL OF BENGAL.

Judgment.

Phillips and *Stokoe*, for the Appellants.

Bonnerjee, for the Respondents.

Phillips.—The present suit, while it is really supplemental of the former suit, asks for further relief, and ought not to have been dismissed. There was no provision in the Code under which the former suit could have been revived. Section 372 did not apply, for the suit, having been struck out, was no longer in existence; and further all the parties being dead, there was no one to consent, or upon whom notice could be served as required by that section.—See *Jackson* vs. *North Eastern Railway Co.*, L. R. 5, Ch. D., 844; and *Eldridge* vs. *Burgess*, L. R. 7, Ch. D., 411.

[PONTIFEX, *J.*—The scheme directed has not been settled; the suit, therefore, may be said to be still pending—See *re Jarvis's Charity*, 1 Dr. and Sm., 97.]

The present case is stronger, for it had abated.

[GARTH, *C.J.*—It seems to me that strictly you ought either to have filed a supplemental bill or to have revived the former suit.]

In the state of doubt as to what should be done, we thought the best course was to file a fresh suit.

[PONTIFEX, *J.*—Under the circumstances you should have applied by motion to the Court.]

That would have been expensive; while, if the whole matter had not been disposed of in the former suit, we were strictly entitled to file a fresh plaint.

Bonnerjee was not called on.

The following judgments were delivered by the Court (1):—

GARTH, *C.J.*:— GARTH, *C.J.*

The only question in this case is, whether the plaintiffs have taken the proper course in bringing a fresh suit, instead of reviving the former one.

The former suit was brought on the 4th of June 1869, by Gobind Chunder Gossami, the father of the plaintiffs, and the trustee named in the will of Cossinauth Mullick against Rungamoney Dossee, the executrix of the will, for the purpose

(1) GARTH, *C.J.*, and PONTIFEX, *J.*

1880

GOCOOL CHUNDER GOSSAMI v. THE ADMINISTRATOR-GENERAL OF BENGAL.

Judgment.

GARTH, *C.J.*

of having the trusts of that will declared and carried into execution.

A decree was made in that suit, by which the will was established, and directions were given for the purpose of having a scheme settled, by which the trusts were to be carried out. Before this scheme was finally settled and approved, and whilst the proceedings were pending, the case was struck out of the board, upon the ground that the plaintiff was not prosecuting them with due diligence; and he and the defendant executrix have since died. The property is in the hands of the Administrator-General, and this suit has been filed by the present plaintiffs claiming to be the trustees of the will in the place of their father, and virtually for the same purposes as the former suit.

Mr. Phillips contends, that this is a supplemental suit to the other, but praying for certain necessary additional relief; and that the plaintiffs, upon whom has devolved the interest of the original trustee, were bound to bring this new suit, because the language of section 372 of the Civil Procedure Code did not admit of their reviving the old suit under that section.

That the plaintiffs (if they are in fact trustees of the will) are entitled and bound to take some proceedings to have the trusts carried out, I have not the slightest doubt. The only question is, in what form those proceedings should be taken.

The difficulty Mr. Phillips points out in reviving the old proceedings under section 372 is this: the section says that "in other cases of devolution of any interest pending the suit, the suit may, with the leave of the Court, *given either with the consent of all parties*, or *after service of notice in writing upon them, and hearing their objections, if any*, be continued by or against the person to whom such interest has come."

Mr. Phillips contends that this case does not come strictly within the terms of the section: 1stly, because the old suit is no longer pending: and, 2ndly, because all the parties to it were dead, and the consent or notice mentioned in the section could not be given.

No doubt the strict language of the enactment does create this difficulty; but I think that a case of this kind is within the

spirit of the section, and that it was never intended that persons in the position of the plaintiffs should be put to the expense of a fresh supplemental suit. Convenience is certainly much in favor of that view.

The original suit, though no longer upon the board, is, I think, capable of revival; and if no persons are living, whose consent may be obtained, or to whom notice may be given, I consider that the Court may give leave without any such consent or notice.

Then, considering that the difficulty has arisen from the language of the section, and that it was clearly right and necessary for the plaintiffs to take some proceedings to enforce the trusts, I do not think we can dismiss the suit; but that the proper course will be to allow the plaintiffs to amend their plaint by putting it into the form of a petition under section 372.

They should be allowed to make such amendments as may be necessary for that purpose; and the defendant should have liberty to put in any answer which he might have done, if the proceeding had been by petition in the first instance.

Then, if the plaintiffs can show that they are entitled to revive the suit, both parties should get their costs of these proceedings, so far as they have gone, out of the estate; but if they fail to do so, they (the plaintiffs) must pay the costs in both Courts.

PONTIFEX, *J.*:— PONTIFEX, *J.*

I wish to add a few words with regard to section 372. I am of opinion that the words "pending the suit" in section 372 relate to a suit in which no final order has been made. In the former suit respecting this will there was a decree that a scheme should be settled. That decree was not proceeded with, and no scheme was settled, and no final order has been made in the suit. I am of opinion, therefore, that proceedings in that suit have not terminated, and for the purposes of section 372 it must be still treated as a pending suit.

[CRIMINAL JURISDICTION.]

1880

February 2nd.

IN THE MATTER OF A. DAVID . . . . . PETITIONER.

Criminal Procedure Code (Act X of 1872), section 458—Procedure—Evidence of one prisoner against another tried jointly.

Where two prisoners are tried together for different offences committed in the same transaction, it is improper and illegal to examine one prisoner as a witness against the other.

IN this case Mowla Bux was charged before a Bench of Magistrates with criminal breach of trust as a servant, under section 408 of the Indian Penal Code, and A. David with receiving stolen property, under section 411 of the Code.

The two prisoners were tried together.

Mowla Bux made a free and full confession. He admitted that he first sent to A. David nine bottles of wine; then six empty and six full bottles, and again seven bottles of wine for sale. He further admitted that the wine and bottles belonged to the District Magistrate, Mr. Porch, in whose service he was. From the evidence of Mr. Porch it appeared that Mowla Bux absconded, and that thereupon, on stock being taken of the contents of the cellar, it was found that a large quantity of wine had been stolen.

The other prisoner A. David, who was a shopkeeper, denied the charge made against him.

The Bench of Magistrates was of opinion that, as the prisoners were charged with separate offences, under section 30 of the Evidence Act, Mowla Bux's statement could not be used as evidence against the other prisoner. They thought, however, that there was independent evidence against David, and upon that found him guilty, and sentenced him to six months' rigorous imprisonment and a fine of Rs. 100. From this conviction and sentence he appealed to the Sessions Court at Rajshahye. By that Court the case was remanded by the order in the following terms:—"It does not appear that the two men were tried jointly or for the same offence. There is no objection to the prisoner Mowla Bux being examined as a wit-

1880

In re DAVID.

Judgment.

The examination of the thief in order to convict the receiver is by no means an unusual practice.

"The case must be remanded to the Bench in order that Mowla Bux may be examined, the prisoner David being allowed to cross-examine him."

The appellant then presented a petition to the High Court, and a rule *nisi* was thereupon directed to issue to the Legal Remembrancer to show cause on behalf of the prosecutor why the order of the Judge should not be set aside as being contrary to law, an order being made at the same time to stay further proceedings before the Bench of Magistrates.

The Junior Government Pleader showed cause.

Piffard, contra.

The judgment of the Court (1), which was as follows, was delivered by

MORRIS, *J.*

MORRIS, *J.*:—

In this case we think that the Judge in appeal was clearly in error in stating that it does not appear that the two men Mowla Bux and Arthur David were tried jointly.

On referring to the original record, we find that the prisoners Mowla Bux and Arthur David were tried together, the one as the thief of certain bottles, and the other as the receiver of those articles, knowing them to be stolen property. The Bench of Magistrates was, in our opinion, right in coming to the conclusion that the statement of Mowla Bux could not be used as evidence against David. The two prisoners were, strictly speaking, being tried together for different offences committed in the same transaction (see section 458, Civil Procedure Code.) In such a trial it seems to us that it would be altogether improper and illegal to take one prisoner from the dock and examine him as a witness against the other prisoner; and, further, if the Court which tried the prisoners had not the power to admit the one prisoner as a witness against the other, it seems to follow as a necessary

(1) MORRIS and PRINSEP, *J.J.*

1880

consequence that the Court of Appeal cannot have more power in this respect than the Court of Original Jurisdiction.

In this view we consider that there was a material error in the order of the Judge directing additional evidence to be taken by the examination of the prisoner Mowla Bux as a witness. We therefore cancel his order, and direct that the record be returned to the Sessions Judge in order that he may decide the appeal upon the evidence as it stands on the record.

[CIVIL APPELLATE JURISDICTION.]

Jan. 28th.

Nos. 1697 & 1759 of 1878.

PURSIDH NARAIN SINGH AND OTHERS . APPELLANTS;

AND

HANUMUN SAHOY AND OTHERS . . . . RESPONDENTS.

Hindu Law—Mitakshara joint family—Mortgage of joint property by father—Mortgage Suit—Parties—Consent of adult members of family—Distribution in life time of father, Share of widow in case of.

The liability of sons under Mitakshara Law to pay the debts of their fathers not incurred for immoral purposes is a liability either attaching to them personally, or to be satisfied in due course of administration, and there is no authority for saying that a judgment-creditor of the father in respect of the father's separate debt can, either in the father's life-time or afterwards, attach or take any specific portion of the ancestral property beyond the father's own proportionate share, without having made the other members of the family parties to the suit.

Quære.—Whether in cases of necessity the father as managing member of a Mitakshara joint family has authority to affect the interests of the adult members of the family without their consent.

A mortgage by the father of a Mitakshara family and sale in execution in a suit thereon during his life-time is a distribution within the meaning of verses 1 and 2 of section 7 of Chapter I of the Mitakshara, and therefore his widow, where there was no necessity for the mortgage, is entitled to an equal share with her husband and sons.

APPEALS from a decision passed by the Subordinate Judge of Gya, modifying the decree of the Sudder Moonsiff of that district.

1880

PURSIDH NARAIN SINGH v. HANUMUN SAHOY.

Statement.

The circumstances of the case are as follows :—

Radha Kishen, the father of plaintiffs 1 and 2, and husband of plaintiff 3, by two bonds purported to mortgage that which was in fact ancestral estate. The family was governed by the Mitakshara, and at the dates of the mortgages both the sons were alive, and it was stated that one at least of them was of age.

From the judgment of the Moonsiff it appeared that the earlier of the two bonds recited, as a necessity for raising the loan secured by it, the performance of the *kharij* ceremony of Kaliram, a deceased member of the family.

And from the same judgment it also appeared that on the face of it, the later of the two bonds purported to be executed as security for the balance of account upon former bonds.

The mortgagees subsequently instituted suits on the bonds, in which suits Radha Kishen, the father, alone was made a defendant; and in execution of the decrees in those suits, four portions of ancestral property were attached and sold by the Court and purchased by the mortgagees themselves, who were represented by the present appellants.

The sale certificates were, in the usual form under the old Code, of the *right, title and interest* of the judgment-debtor.

It was doubtful from the materials before the Court whether any one of the four properties now sued for was included in either of the mortgage bonds; but it was admitted on behalf of the appellants that only one of the properties sued for was so included.

The sales took place, and possession was taken under them of the whole 16 annas of the four properties more than eleven and less than twelve years before suit. The plaintiffs sued to recover possession of the whole 16 annas of the properties.

The Moonsiff dismissed the plaintiff's suit altogether, holding that sufficient necessity had been shown to exist to authorize Radha Kishen, as managing member of the family, to make the mortgages.

The Moonsiff did not seem to have noticed that at least three of the properties were not included in the mortgages; but he did find that Radha Kishen did not employ the monies borrowed for immoral purposes.

The Subordinate Judge considered it unnecessary to find whether the money was borrowed for necessary purposes, or appli-

1880

PURSIDH NARAIN SINGH v. HANUMUN SAHOY.

Argument.

ed to immoral purposes; but upon the grounds that the father alone was a defendant to the suits, and that the sale certificates related only to the right, title and interest of the judgment-debtor, held: 1st, that only Radha Kishen's interest passed by the sales; 2nd, that the widow was not entitled to any share; and, 3rd, that the two sons were entitled to recover two-thirds of the properties sued for.

Against the whole decree a special appeal was preferred to the High Court by the defendants; and against the second finding of the Subordinate Judge a cross-appeal was preferred by the plaintiffs.

Baboo *Chunder Madhub Ghose*, and Baboo *Jadoonath Sahoy*, for the Plaintiffs, Respondents.

Mr. *M. L. Sandel*, and Baboo *Sreesh Chunder Chowdhry*, for the Appellants.

Mr. *M. L. Sandel*.—Although generally it is the right, title and interest that is sold in execution, yet in the case of a sale in execution of a decree upon a mortgage of joint property under Mitakshara Law executed by the father of the family, the whole property mortgaged passes to the purchaser.

The purchaser is not bound to look beyond the decree to ascertain whether the Court was right in granting that decree—*Gridharee Lall* vs. *Kantoo Lall*, L. R., 1 I. A., 321; S. C. 25 W. R., 56. In this case, however, it has been held that the adult son stood by and allowed the purchaser to take possession. [The cases of *Suraj Bunsi Koer* vs. *Sheo Proshad Singh*, L. R., 6 I. A., 99; S. C., 4 C. L. R., 226; *Deendyal Lal* vs. *Jugdeep Narain Singh*, L. R. 4 I. A., 247; S. C. 1 Cal. L. R., 49, were also referred to and commented on.]

[PONTIFEX, *J.*—If the father could make a valid mortgage without the consent of his adult sons, we agree that your case is clear, but the question is whether he could do so.]

I contend that the father as manager of the family had power to mortgage the property on behalf of the whole family.

In the case of *Gunga Pershad* vs. *Sheo Dyal*, 5 Cal. L. R., 224, MITTER and TOTTENHAM, *J.J.*, held that an alienation

joint Mitakshara property made by a father for the purpose of paying off an antecedent debt was binding on the sons unless that debt was contracted for immoral purposes.

[PONTIFEX, *J.*—The whole property did not pass in Deen Dyal's case, where the debt was a debt of the father for which the son was bound.]

That case, if it applies at all, applies only to the property not included under the mortgage.

Baboo *Jodoo Nath Sahoy* (on the same side.)—In the case of *Gunesh Pandey* vs. *Dabee Doyal Singh*, 5 C. L. R., 36, it was laid down that a purchaser at an execution sale takes nothing more than appears on the sale certificate and the decree.

[PONTIFEX, *J.*—That case does not touch the other point in this case as to whether the sons are not liable for all debts of the father not contracted for immoral purposes.]

It is not necessary here to press that point, for it is clear that the plaintiffs had notice of the transactions.

Baboo *Chunder Madhub Ghose.*—The only cases in which the legality of the debt comes in question are, where the father intended or purported to alienate the entire property. The only question here is—what was sold, and if it be shown that none of the properties sold were mortgaged, the appeal here fails.

In the cross-appeal I contend that the widow is entitled to a share, for it must be taken that there has been a distribution of the family property in the lifetime of her husband—See *Mohabeer Pershad* vs. *Ramyad Singh*, 20 W. R., 192—Mitakshara, Chapter I, section VII, verses 1 and 2.

Mr. *M. L. Sandel* in reply contended that the cross-appeal should be dismissed, as the widow had no *locus standi.*

The judgment of the High Court (1) was as follows :—

This case is one more instance of the plentiful crop of litigation which has sprung out of the decisions in the reported cases of *Gridharee Lall, Muddun Mohun Thakoor* and *Deen Dyal Lall.*

(The learned Judge here stated the facts and proceeded as follows) :—

The principles of law which apply to this case, and which

(1) PONTIFEX and MCDONELL, *J.J.*

1880

PURSIDH NARAIN SINGH v. HANUMUN SAHOY.

Judgment.

are partly to be gathered from the text books and the cases, seem to us to be the following :—

"That under the law of the Mitakshara each son upon his birth takes a share (interest) equal to that of his father in ancestral immoveable estate is indisputable"—*Suraj Bunsi Koer* vs. *Sheo Pershad Singh*, L. R. 6 Ind. A. 99, S. C. Nom., *Ram Sahai* vs. *Sheo Prosad Singh*, 4 C. L. R., 226.

The father, as managing member of a Mitakshara family, when the other members of the family are all minors (S. C., p. 101), may have authority to convey or charge the whole 16 annas of the ancestral property for the purposes of family necessity. But if a stranger deals with the father alone as managing member, he is, in our opinion, bound to see that a necessity exists.

If no necessity exists, then no power of dealing with the rights of the other members in specific ancestral property exists; and a sale by the father, though purporting to affect the whole 16 annas, can only pass his own right, title and interest; to affect which alone, under the circumstances his power, or in Bengal having regard to *Sudaburt's* case, 3 B. L. R., F.B., 31, his creditor's rights, could extend. Whether in cases of necessity, a father as managing member has authority to affect the interests of the adult members of the family without their consent, seems still undecided. The Judicial Committee in *Suraj Bunsi Koer's* case, L. R. 6 Ind. App., p. 101, say :—"It is not so clearly settled whether, in order to bind adult co-parceners, their express consent is not required; but this is a question that does not arise in the present case." So, in the case before us, as it has not been found whether either of Radha Kishen's sons was of age at the respective dates of the mortgages, the question may not arise; and we do not at present feel bound to give a positive opinion upon it. But we may refer to the Mitakshara, Chap. 1, sec. 1, verses 27, 28 and 29 as dealing with the question; and may say that as at present advised we can see no reason why a mortgagee or purchaser should be excused from exercising ordinary caution and obtaining such consent. The case of *Gridharee Lal*, which is always so much relied upon, decided a question of Mithila Law; and moreover in that case a necessity affecting the whole family was proved to have existed; for

there were execution proceedings affecting the family dwelling house or at least the father's rights therein, a sale of which had been advertised, and which sale, if carried into effect, must have been detrimental to the family. Even if that case had not been explained in more recent decisions of the Privy Council, we think that the general language of the judgment, applying as it did to the particular facts found in the case, cannot be taken as an authority for the proposition that a Mitakshara father may, when no necessity exists, convey or charge the rights in specific ancestral property of the other members of the family.

Under the Mitakshara Law sons are bound to pay the debts of their father which have not been incurred for immoral purposes. But this is a liability either attaching to them personally or to be satisfied in a due course of administration, and we find no authority for saying that a judgment-creditor of the father, in respect of the father's own separate debt, can either in the father's lifetime or afterwards attach or take any specific portion of the ancestral property beyond the father's own proportionate right in it, without having made the other members of the family parties to his suit. The case of *Deen Dyal Lal*, L. R. 4 Ind. App., 247; 4 C. L. R., 226, is an authority of the Privy Council for holding in a case where no necessity is shown to have existed, that execution proceedings by a judgment-creditor on a bond given by a Mitakshara father, against property not hypothecated by the bond, and when the father alone had been made a defendant to the suit, cannot affect the interests of the other co-sharers of the family. Indeed, if it were otherwise, there would be an end virtually of the Mitakshara family; for a father would only have to borrow for purposes not immoral and submit to a decree, and the family might in execution of that decree be deprived of the most cherished portion of the ancestral property without any opportunity of redeeming it.

A mortgagee dealing with a Hindoo governed by Mitakshara Law, is, in our opinion, bound to enquire into the state of the family; and if he finds there are other members of it besides the father with whom he is dealing, he is further bound to enquire into the necessity of the transaction; and if there are adult members

1880

PURSIDH NARAIN SINGH v. HANUMUN SAHOY.

Judgment.

of the family, it is at least doubtful whether he ought not to obtain their consent.

A mortgagee can only take such a charge on specific ancestral property as the mortgagor can give, and if the mortgagor is acting as managing member, he can affect the 16 annas of the property only in cases of necessity, and if there are adult members of the family, perhaps only with their consent.

And it is difficult for us to see how the purchaser under a mortgage decree can obtain any better or more extensive title than the mortgagee and mortgagor could conjointly give. There is no magic in a Court or Judge which enables them to deal with or effect property in any higher or more extensive degree than the parties to the suit conjointly could do.

The sale by the Court does not give what is called in England a parliamentary title, but is only a link in the chain of the title; and a purchaser is, or in our opinion ought to be, as much bound to see that all proper parties are represented in a suit as he would be to see that all persons interested were parties to a conveyance. We can see no difference between the effect of a decree of our Courts, and the effect of a decree of the Court of Chancery in England; but if there is any difference, it would seem to be to the disadvantage of the Indian decree, which by express enactment dealt only with the "*right, title and interest*" of the defendant to the suit *by name*.

It has been decided that, if the managing member of a family, the other members of which are at the time minors, having authority (the touchstone of which is necessity), mortgages the whole 16 annas of the ancestral property, then in a suit by the mortgagee the sale under the decree would pass the whole 16 annas of the mortgaged property, although the mortgagor alone was made defendant; and the reason for such decision probably is, that the 16 annas having been validly mortgaged to the mortgagee, and his remedy being foreclosure or sale, the decree of the Court would affect what was in the parties before it, namely, the mortgagee's right, validly acquired, to have the whole 16 annas sold. Though even in that case (where necessity would have to be proved by the mortgagee and purchaser

seems to us that the Courts would exercise a wise discretion in enquiring into the state of the mortgagor's family, and directing that the adult members of such family (if any, at the date of the suit) should be made co-defendants, so as to give them an opportunity of redeeming, and also in order to secure the due application of any surplus sale monies, in the same way as the Court of Chancery in England acted in analogous cases. (See *Goldsmid* vs. *Stonehewer*, 9 Hare, Appx., 40; *Young* vs. *Ward*, 10 Hare, Appx., 58; and *Siffken* vs. *Davis*, Kay, Appx., 21.) For it must be remembered that in a large proportion of mortgage suits in India the mortgagee himself, as in the case before us, becomes the purchaser, and thus virtually obtains all the benefits of forclosure without sacrificing his other remedies as a mortgagee.

Applying the principles to which we have referred, and which seem to us correct, to the case before us, we should be of opinion, even if this was not a special case, that as the father alone executed the mortgages and was made defendant to the suit, the sale in execution could, as against those members of the family who were minors at the dates of the respective mortgages, pass the entire 16 annas of the mortgaged ancestral property, only in the event of the defendants proving that sufficient necessity existed for incurring the debt, and if no necessity was proved, could pass to the defendants only the right, title and interest of the father, Radha Kishen, although the loans might not have been applied by him to immoral purposes, and the sons might, if properly proceeded against, have been bound to pay their father's debt; and if any members of the family were adult at the dates of the respective mortgages, it is still an open question whether, even if necessity were proved, their interests could be affected without their consents. But this is a special case, for here the mortgagees and purchasers were the same persons, and therefore in this case, at all events, only the right, title and interest would pass, unless necessity was shown to exist. With respect to the properties not included in the mortgages we are of opinion that the execution sales could only pass the right, title and interest of the father Radha Kishen, and therefore with respect to such last-mentioned properties, the decree of the

1880

PURSIDH NARAIN SINGH v. HANUMUN SAHOY.

Judgment.

Subordinate Judge will, subject to the observations we shall presently make in the cross-appeal, be affirmed, and the appeal will be dismissed with costs. In the words of the Privy Council in *Deen Dyal's* case—If the defendants had sought "to go further, and to enforce their debt against the whole [16 annas of the] property, and the co-sharers therein, who were not parties to the bond, they ought to have framed their suit accordingly, and have made those co-sharers parties to it." But with respect to such parts of the properties sued for (if any) as were included in the mortgage bonds, or either of them, as there has been no finding of the lower Appellate Court with respect to the existence of sufficient necessity for the loans, or as to the ages of the sons at the dates of the respective mortgages, the case must go back there for a decision on the following points :—

1*stly*.—Whether any, and what part, of the property sued for was included in the mortgage bonds respectively, and if any part was included in them :

2*ndly*.—Whether sufficient necessity existed for incurring the debt secured by each bond so as to bind the 16 annas of the property mortgaged by it ; and

3*rdly*.—Whether either and which of the sons was of age at the dates of the mortgages respectively ; if either was of age, whether he consented to the mortgage ; and if he did not consent, whether he was bound by the mortgage, and the Subordinate Judge must reconsider his judgment and decide the case so far as it relates to the property comprised in either of the mortgages in accordance with the findings he may arrive at on those points, and the costs of the appeal in relation thereto will abide the result.

With respect to the cross-appeal, no distinct authority has been quoted or appears to exist ; we must, therefore, deal with it as a new case. The question is indeed mooted in the last words of the Privy Council judgment in *Deen Dyal's* case, but does not appear to have been raised in the subsequent case of *Sarup Bunsi Koer*, L. R. 6 Ind. App., 88, where the infants sued by their mother as guardian. Possibly the reason for not there raising it was, because the mother was not strictly a party to the suit ; or because in the previous execution proceed-

(see p. 96) an order had been made rejecting her claim, to which she had submitted. By verses 1 and 2 of section 7, Chapter 1 of the Mitakshara, it is declared that upon a distribution made either during the life of a father or after his decease, the wife is to take an equal share; but in the *latter* event she will be only entitled to half a share, if any separate property has been given to her.

Now we are of opinion that the mortgages of the father and the sales in execution against him which occurred during his lifetime must, as against the defendants, be taken to be a distribution within the meaning of those verses; and as possession was taken by the defendants during the father's lifetime, we must consider it a distribution made within that period, and therefore that the widow is entitled to an equal share with her husband and sons.

If, however, a necessity shall be found to have existed for incurring the loan for which any portion of the properties sued for was mortgaged, the widow will be entitled to no share in the property included in such mortgages. With respect to the properties not included in the mortgages, she is entitled to a one-fourth share, as also to the same share in the mortgaged properties, if no sufficient necessity shall be found to have existed. The decree of the lower Appellate Court will be modified accordingly, all such parts of the properties sued for as were not mortgaged for purposes of necessity being for this purpose divisible into fourths, and the cross-appeal is allowed with full costs or apportioned costs according to the findings which the lower Appellate Court shall arrive at.

By their plaint the plaintiffs prayed that mesne profits for the period of pendency of suit up to the day of recovery of possession to such amount as may be determined in execution of decree, may be awarded to them; such mesne profits will of course be governed by the ultimate decision in the case.

[CIVIL APPELLATE JURISDICTION.]

1880 *February.*

BANK OF BENGAL (PLAINTIFF) . . . . APPELLANT;

AND

M. A. MENDIES (DEFENDANT) . . . . . RESPONDENT.

Public Debt Office—Bank of Bengal—Mortgage of Government Security—Negotiable Instrument—Title—Presumption as to endorsements on stolen Note.

The business of the Public Debt Office is entrusted by the Government of India to the Bank of Bengal, and is transacted by the Bank, separately from their own business as Bankers.

A promissory note for Rs. 10,000 was sent to the Public Debt Office from the treasury at Backergunge for enfacement, in order that interest might be obtained upon it at the Backergunge Treasury. Whilst the note was at the Public Debt Office for this purpose, it was stolen from them by one of the Bank Clerks.

After this the defendant took a loan from the Bank in their private capacity, giving them his promissory note for the amount of the loan, and deposited with them three Government notes, one of which was the stolen note for Rs. 10,000.

The Bank subsequently sent this note at the request of the defendant to the Public Debt Office for enfacement, and the Public Debt Office detained it, upon the ground that it had been previously stolen from them, whilst in their custody.

The Bank thereupon sued the defendant on his promissory note, and he resisted the suit upon the ground that he was not bound to pay the amount till all his securities were returned to him.

There were apparent endorsements on the Government note prior to that of the thief, by whom it was endorsed over to B, who sold it to the defendant for full value, but there was no evidence that these were genuine, or that the note had been actually negotiable at the time of the theft.

Held by GARTH, *C.J.*:—That no presumption in favour of negotiability could be made from the apparent endorsements which had not been proved, and that the defendant, therefore, had not established a superior title (of purchaser *bonâ fide* without notice of the theft for value of a negotiable instrument) to rebut the *prima facie* title of the Public Debt Office as agents for the Government on behalf of the true owner, and that under the circumstances the Public Debt Office was justified in detaining the note.

Per PONTIFEX, *J.*—Whether the Public Debt Office was so justified or not, the plaintiffs were entitled to recover the amount of their loan.

1880

BANK OF BENGAL v. MENDIES.

Statement.

APPEAL from a decision passed by Mr. Justice WILSON.

The plaintiffs in this case were the Bank of Bengal, who not only carry on the ordinary business of Bankers, but under an arrangement with the Government have the management of the Public Debt Office in which certain of their officers are specially employed.

In October 1878 a Government note for Rs. 10,000 was transmitted from the Treasury at Backergunge to the Public Debt Office for enfacement, that is to say, for being marked in the way necessary to obtain payment of interest upon it at Backergunge. It was not shown to whom the note belonged, or on whose behalf it was sent for enfacement.

The note was duly received at the Public Debt Office, and its receipt entered in the proper Book. It then disappeared before it was enfaced. When it next appeared, it had the endorsement of Grish Chunder Bonnerjee, a clerk in the Public Debt Office, who immediately after the loss of the note left the office.

It was subsequently found that Grish Chunder Bonnerjee had stolen the note. By him it was sold to Prosad Dass Bural, who sold to the defendant. The full value was paid in each case.

In October 1878, the defendant applied to the Bank for an advance of Rs. 14,700, which the Bank agreed to make on the security of the defendant's own promissory note, and the deposit of Government notes.

The form of application for the loan specified by their numbers the notes which were to be deposited, and one of these was the stolen note. Before finally agreeing to the advance the officer of the Bank in charge of the Loan Department sent the application showing the numbers of the notes to the Public Debt Office, and received it back with a written memorandum to the effect that the notes had not been stopped, and thereupon the loan was made and the agreed securities given.

Shortly afterwards letters from the Backergunge Treasury called the attention of the Bank in its Public Debt Department to

1880

BANK OF BENGAL v. MENDIES.

Argument.

the fact that the note in question had not been returned enfaced. Enquiries were then made, the loss was discovered, and the note stopped.

Some time after this, at the request of the plaintiffs, the note was sent from the Loan Department of the Bank to the Public Debt Office for payment of interest. In the latter department it was recognised as the stolen note and detained. The Bank then demanded repayment of the loan. The defendant refused to pay unless the Bank would give back the securities including the Rs. 10,000 note.

The Bank thereupon brought the present suit upon the defendant's promissory note.

There were two blank endorsements upon the note prior to that of Grish Chunder Bonnerjee; but no evidence was given as to their genuineness or otherwise.

Mr. Justice WILSON held that in the absence of any evidence to the contrary, these endorsements must be taken to be genuine, and that the note when stolen was payable to the bearer, and that the defendant as holder for value had a good title.

He, therefore, directed that the defendant should pay the Bank the sum of Rs. 14,700 upon their delivering up to him the securities including the Rs. 10,000 note.

From this decision the plaintiff Bank appealed.

Paul (Advocate-General), and *Phillips*, for Appellant.

Branson and *Stokoe*, for the Respondent.

Paul (Advocate General).—The question is one of mortgage, and not of bailment. Negotiable instruments are not included in the term "goods" spoken of in the bailment section of the Contract Act. Part of the security taken by the Bank having turned out to be bad, we are entitled to rely upon our other rights, one of which is to sue upon the promissory note given by way of collateral security.

The defendant has not shown that the property in the note has passed to him as a *bonâ fide* purchaser for value; for I am now prepared to show that the endorsements prior to that of the thief were forgeries, and that the note, therefore, never was negotiable.

1880

BANK OF BENGAL v. MENDIES.

No evidence was given as to the genuineness of these endorsements, and the Court was wrong in presuming their genuineness.

[GARTH, *C.J.*—Ought you not to be in a position to show that you could not give the security up ?]

Judgment.

The Bank of Bengal as such is absolutely separate from the Public Debt Office. The fact of the note having been presented by the Bank of Bengal had nothing to do with its being detained in the Public Debt Office.

Phillips followed on same side.

Branson (for the Respondent). The defendant was in possession of the note through the Bank, and until his title has been determined, the burden is on the Bank to prove that he had not a valid title—Evidence Act, section 110.

[PONTIFEX, *J.*—That section does not apply here. It is the Public Debt Office that is in possession.]

If that is so, the Bank is not entitled to set up a *jus tertii* without determining our title. *Biddle* vs. *Bond*, 6 B. and S., 225.

Before the Bank had any title, the note had become negotiable by the blank endorsements, and its negotiability could not afterwards be restrained by the special endorsement. *Walker* vs. *MacDonald*, 17 L. J. Exch., 377—(S. C.) 2 Exch., 527.

[PONTIFEX, *J.*—The money ought to have been paid into Court as was done in the case of *Schoole* vs. *Sall.*, 1 Sch. and Lef., 176.]

[GARTH, *C.J.*—You must show that you had a good title to the note.]

That is viewing the suit as it had been brought by us.

Stokoe on the same side contended that the Bank of Bengal was in the position of a bailee. He referred to sections 166 and 167 of the Contract Act, and section 117, Expl. II, of the Evidence Act.

The Counsel for the appellants were not called upon to reply.

The following judgments were delivered by the Court (1) :—

GARTH, *C. J.*:—

This suit is brought by the Bank of Bengal, to recover from the defendant the sum of Rs. 14,700 and interest, upon his promissory note.

(1) GARTH, *C.J.*, and PONTIFEX, *J.*

1880

BANK OF BENGAL v. MENDIES.

Judgment.

GARTH, *C.J.*

The defendant's answer is, that the note was given to secure to the Bank the re-payment of a loan which they made to him in October 1878; that as part of the same transaction, he deposited with the Bank, by way of further security, certain Government Notes, one of which was for Rs. 10,000, and that he is not bound to pay them their money unless they are prepared to give him back these notes.

The Bank are ready to give up all the securities, except the note for Rs. 10,000, which they say that they are unable to return for the following reason :—

In one branch of their establishment they carry on the ordinary business of Bankers; in another, which is called the Public Debt Office, they have the management of the Public Debt on behalf of the Government; both branches being under the charge of officers, who are employed and paid by the Bank of Bengal.

Before the loan in question was effected, the Government note for Rs. 10,000 had been sent from the Treasury at Backergunge to the Public Debt Office "*for enfacement*," that is to say, for the purpose of being marked, so that interest might be obtained upon it at the Backergunge Treasury. It does not appear on whose behalf this note was sent from Backergunge, or who was the actual holder of it at that time.

The learned Judge finds upon the evidence—and in this I quite agree with him—that the note was stolen whilst in the Public Debt Office by an officer employed there called Grees Chunder Bonnerjee; (in fact we now learn that this man has been subsequently convicted of stealing it); but the theft had not been discovered at the time when the defendant's loan was effected, and consequently when the Bank sent at that time to enquire at the Public Debt Office whether the note had been stopped, the answer was, that it had not.

The theft, however, having been afterwards discovered, a notice in the usual course was inserted in the *Calcutta Gazette*, that in consequence of the note having been stolen, the payment of the note and of interest upon it was stopped.

On the 29th of November the note was at the request of the defendant sent by the Bank to the Public Debt Office, in order that interest might be obtained upon it; and it was then [illegible] there stopped by Mr. Biss, who was the Officiating Superin[illegible]

dent in that office.

A letter of the 6th of October 1878 was then sent by the Bank to the defendant, requesting him at once to re-pay the loan, and informing him that the Rs. 10,000 note had been stopped.

Upon this, a correspondence ensued, the effect of which was that the defendant refused to pay the money until the Rs. 10,000 note was returned; and the Bank on the other hand insisted that they could not and were not bound to return it, because it was stopped in the Public Debt Office.

In this state of facts the learned Judge in the Court below has decided that the plaintiffs have shown no sufficient reason for refusing to return the note to the defendant. He considers that they are in a position to return it, and that until they do so, the defendant is not bound to repay the money. And he seems to say further, that assuming the plaintiffs to have the right to hold the note against the defendant, if they could show that they had a better title to it than he has, they have not shown such a title.

I am unable to take this view of the plaintiff's rights or position. I quite agree, that if it were in the plaintiff's power, consistently with their relations to the Government, to return the note to the defendant, they must be ready to do so, before they could ask for repayment of the loan.

But it appears to me, in the first place, that it is no longer optional with the plaintiffs to return the note to the defendant. It has been stopped in that branch of their establishment, where they are acting, not in their capacity of private Bankers, but as the agents of the Government. The Public Debt Branch of the establishment seems to me, for the purposes of this question, to be as much a Government office, as if it were carried on separately under the management of officers in direct Government employ.

That being so, this note was stolen, whilst it was virtually in the hands of the Government. It was in the custody of the Government on behalf of the person to whom it belonged at the time when it was stolen from the Public Debt Office.

It then came into the possession of the plaintiffs, when the defendant's loan was effected, in their private capacity of Bankers; and, at the defendant's own request, it was sent to the Public Debt Office to obtain the interest payable upon it. It was then

1880

BANK OF BENGAL v. MENDIES.

Judgment.

GARTH, *C.J.*

and there detained by the Superintendent of the Public Debt Office; and I consider, that as he held it as the agent of the Government on behalf of the true owner at the time when it was stolen, he was not only at liberty, but bound, to detain it on behalf of that person, when it thus came back into his possession.

It was contended on the part of the defendant that the Public Debt Office had no right to detain the note, and that at the utmost they could only have given notice to the person for whom they originally received it, to enable him to contest the defendant's title; and if he did not contest it within a certain time, they were bound to return it to the defendant. But I think, as at present advised, that this was not the position of the Public Debt Office. It might have been their position, no doubt, if they had received a notice in the nature of a stop order from some third person, who had lost it, or from whom it had been stolen. But as they were themselves the custodians of it, when it was stolen from them, I think that they were justified in detaining it as such custodians, until the defendant could make out a better title to it than the person from whom they received it.

But however this may be, the Bank had no right or power in my opinion to take it, in their private capacity, out of the hands of the Public Debt Office.

If the Bank of Bengal and the Public Debt Office had been two separate establishments, the one under the charge of the Bank Officers, and the other under the charge of the Government, I take it there would have been no doubt that the Bank under the circumstances would have had no power of returning it to the defendant, and it seems to me that the fact of the Public Debt Office being managed by the Bank, instead of by the Government, makes no difference in this respect.

I cannot accept the view, which appears to have been acted upon in the Court below, that the Bank are detaining the note "*for their own protection and in their own interest.*" This is not, I think, what the Bank's witnesses say or mean; and it is not the Bank's true legal position. In my opinion the Bank in its private capacity has no more right or power to take the note out of the hands of the Public Debt Office, after it has been detained there, and to hand it over to the defendant, than it would

had if the Public Debt Office had been a separate Government establishment.

If this were not so, and if the rights of holders of Government Paper were to be less secure in consequence of both establishments being under the control of the Bank Officers, I think it would clearly not be right in the interest of persons dealing with the Government to allow the Public Debt to be any longer managed by the Bank of Bengal.

But there is another view of this case, which has been dealt with by the Court below, and which also appears to me to afford a complete answer to the defendant's contention.

Assuming the Bank to be now bailees of the note, and to have no right to detain it as against the defendants, unless they can show that they hold it by a better title, the question then arises, whether they have not in fact proved that they hold it by a better title?

Now I quite agree with the Court below, that, in determining this question, the *onus probandi*, in the first instance, lies upon the Bank. They are bound to show that they hold the note by a title superior to the defendant; and even if they prove such a title, *primâ facie*, the defendant is at liberty to rebut it by proving a better one.

Then how stands the evidence in this respect?

The defendant does not pretend to say that he was the owner of the note when it was sent to the Public Debt Office from Backergunge, or that he derives title from the person who owned it at that time. His title, such as it is, is derived from Grees Chunder Bonnerjee, who stole it.

Now I take it to be clear law, that when an instrument, such as the note in question, has been stolen, the person from whom it was stolen has a good title to it, not only as against the thief, but as against any person who subsequently becomes the holder, unless such person can prove that the instrument had become negotiable at the time it was stolen, and that he obtained it *bonâ fide* for value without notice of the theft, (see *Raphael* vs. *Bank of England*, 17 C. B., 161; *Miller* vs. *Race*, 1 Smith's Leading Cases, and authorities there cited.) Now here I am satisfied that the note was stolen whilst it was in

1880

BANK OF BENGAL v. MENDIES.

Judgment.

GARTH, *C.J.*

the custody of the Public Debt Office, and before the defendant had any title to it. The Bank, therefore, as agents for the Government on behalf of the true owner from whom and for whom they received it, have *primâ facie* a better title to the note than the thief, or any one claiming it from or through the thief. They have shown therefore *primâ facie* as it seems to me that they hold the note by a title superior to that of the defendant.

But then has the defendant rebutted that *primâ facie* case by showing that he is a *bonâ fide* holder of the note for value? I think he has not.

The first thing which he was bound to prove for this purpose was, that the note at the time it was stolen was a negotiable instrument, that it had become so by being endorsed in blank. Of this he has given no evidence. He has not shown that any of the endorsements prior to that of Grees Chunder Bonnerjee were genuine, or that they were upon the note at all before it was stolen.

The learned Judge in the Court below has relieved the defendant from this difficulty, by presuming in the absence of evidence to the contrary, that the apparent endorsements prior to that of Grees Chunder were genuine. But in this I cannot agree with him. I think that we have no right to make any presumptions in favor of the holder of a stolen note; on the contrary, we are bound to see for the protection of the party, who has been robbed, that every link of the holder's title is strictly proved. If Grees Chunder Bonnerjee was rogue enough to steal the note, he might well have been also rogue enough to forge endorsements, for the purpose of giving it an appearance of negotiability.

I do not enter into the further question, which will probably have to be decided in another suit, whether, assuming the negotiability of the note, the defendant has sufficiently shewn that he is a *bonâ fide* holder for value?

There is nothing in our present judgment to prevent him from bringing a suit against the Government, or against the Bank as the agents of the Government, or both, to establish his title to the note as against the party who was robbed. All that we

1880

BANK OF BENGAL v. MENDIES.

Judgment.

GARTH, *C.J.*

have to decide here is, whether the plaintiffs are entitled in this suit to recover from the defendant the amount due for principal and interest upon the note made by himself, and for the reasons which I have already given I consider that they are so entitled.

I think, therefore, that the judgment of the lower Court should be reversed, and that the plaintiff's claim should be decreed with interest at the current rate charged by the Bank of Bengal from the 23rd October 1878, to the date of this decree, and thereafter on the aggregate amount of principal and interest at the rate of 6 per cent. with costs in both Courts.

PONTIFEX, *J.*

PONTIFEX, *J.*:—

In this case the defendant having taken a loan from the Bank of Bengal deposited with them as security for it three Government loan notes: one for Rs. 10,000, one for Rs. 5,000, and one for Rs. 1,000, and by way of collateral security gave the Bank a promissory note.

The Bank of Bengal in strict performance of their duty to the defendant for the purpose of drawing interest on his behalf and at his request, presented the loan note for Rs. 10,000, at the Public Debt Office, the conduct of which, as it happens, has been confided to the Bank by the Government, and the business of which is carried on in their premises but in separate rooms, through separate officers, and by separate books.

The Public Debt Office rightly or wrongly (as to which I decline to give any opinion in this suit) detained the note, insisting that it had been stolen from their previous custody, and they decline to give it up without suit. The Advocate-General representing the plaintiff Bank has formally denied, on behalf of his client that the Bank, *qua* Bank, detains the note.

Under these circumstances, the Bank having been deprived, at least for the time, of the main portion of their security, and being under reasonable apprehension that it may ultimately prove valueless, sue the defendant on his promissory note. The defendant resists the suit on the ground that he is not bound to pay until his securities are returned to him; and a decree has been made in the lower Court upon that footing. It seems to

1880

BANK OF BENGAL v. MENDIES.

Judgment.

PONTIFEX, J.

me that even if the Bank had by carelessness lost or mislaid the security, or if it was responsible for the detention of the loan note, the proper decree would have been for payment into Court by the defendant of the amount due by him as in *Schoole* vs. *Sall*, 1 Schoales and Lefroy, 176. See also *Bentinck* vs. *Willink*, 2 Hare, p. 1.

But as I view the evidence, and having regard to the disclaimer by the Advocate-General of any detainer by the Bank, *qua* Bank, the case presents itself to my mind under the following aspect:—A mortgagor gives a mortgagee what is either a bad security, or what can only prove to be a good security after the delay and cost of legal proceedings.

In the first case, the mortgagor has certainly no case for resisting payment; and in the latter case I cannot see that he has any equity to force his mortgagee, who has no knowledge of the manner in which the defendant became possessed of the note, to take proceedings for his benefit, which must take time and may be inoperative, and meanwhile to keep his mortgagee out of his money. At the most what he seems to me entitled to ask is liberty, if necessary, to take proceedings in his mortgagee's name upon an undertaking to indemnify the mortgagee against costs. Either with or without that liberty, I think, he is bound to pay the debt.

The case has been argued as if it were a case of bailor and bailee, and section 160 of the Contract Act has been relied on. But that section is not even included among the sections which relate to bailment of goods as security for payment of debts (section 172 to section 179.) In my opinion neither section 160 of the Contract Act, nor section 117 of the Evidence Act, affects the present suit.

I think, therefore, the decree below must be reversed with co[sts] on scale 2, and the defendant, having such liberty as I h[ave] mentioned, must be directed to pay to the plaintiff Bank [the] principal and interest secured by the promissory note up to [the] date of our decree, with subsequent interest at the rate of [six] cent. on the aggregate amount of principal, interest and [costs] up to date of payment upon the return by the Bank of th[e] notes for Rs. 1,000 and Rs. 5,000 respectively.

GARTH, *C.J.*:— 1880

With regard to what has just been said by my learned colleague, I quite agree that the defendant should be at liberty to use the Bank's name if he pleases upon giving them an indemnity, and also that when he pays the sum due, he is entitled to a return of the securities, other than the Rs. 10,000 note.

[FULL BENCH.]

IN THE MATTER OF PITAMBUR SINGH . . APPELLANT. 1879 *Dec. 8th.* No. 543 of 1879

Adultery—Evidence Act (I of 1872) section 50—Penal Code, Act XLV of 1860, section 497—Marriage, Evidence of.

Where a marriage is an ingredient in an offence, as in adultery, bigamy and enticing away a married woman, it must be strictly proved.

THIS case was referred to a Full Bench by Mr. Justice WILSON and Mr. Justice L. R. TOTTENHAM, two of the Judges of this Court, with the following expression of opinion :—

In this case the prisoner has been convicted of adultery under section 497 of the Indian Penal Code.

The only evidence of the marriage of the woman is the statement of the prosecutor, "she is my wife by marriage," and the statement of the woman, "I am married to Somra" (the prosecutor.)

We desire to submit for the opinion of a Full Bench the question whether a conviction for adultery can be sustained upon such evidence of the marriage.

Two decisions of this Court appear to be in conflict. In *Reg.* vs. *Smith*, 4 W. R. Cr. R., 31, a conviction of adultery was set aside on the ground (amongst others) that there was no sufficient proof of the marriage, and it was laid down that "in proceedings founded on a charge of adultery strict proof of the marriage is required."

To the same effect is letter No. 1141, of 15th December 1865, issued by this Court (see 4 W. R. Cr. Letters, 10.) In the *Reg.* vs. *Wazira*, 8 Ben. L. R. App., 63, evidence of the same nature as that in the present case seems to have been held sufficient.

1879

In re PITAMBUR SINGH.

Statement.

It appears to us that upon principle such evidence must be held insufficient. The marriage of the woman is as essential an element of the crime charged as the illicit intercourse : and it ought, we think, to be proved, like any other essential fact in the case, by the direct evidence of witnesses speaking to the facts said to constitute a marriage (Evidence Act, section 60), so that the Court may determine whether what they state to have taken place did take place in fact, and if so, whether it constitutes a marriage in point of law.

The sections of the Evidence Act which in certain cases and for certain purposes allow less strict proof of marriage appear to be section 32, which has no application here, and section 50 which expressly excludes from its operation criminal charges of bigamy, adultery and enticing of married woman. This express exclusion seems to us strong to show, that in such cases the legislature intended the marriage to be proved by direct evidence.

The Indian Divorce Act (Act IV of 1869,) which governs Civil proceedings based upon adultery, confirms this view. It gives the form of a petition for divorce in which the marriage is alleged as a fact with time and place. If this is to be alleged, it is presumably because it ought to be proved, and it can hardly be supposed that greater strictness of proof is to be required in a civil proceeding, than in a criminal proceeding founded upon the same facts.

It appears to us that the framers of the Evidence Act have endeavoured, in dealing with this subject, exactly to follow the English law, and in England there has never been any doubt that on an indictment for bigamy the first marriage, or in proceedings founded upon adultery, the marriage must be proved with the same strictness as any other material fact.

We cannot see that any inconvenience is likely to follow from adopting the stricter rule. Amongst the large majority of the people of this country marriage is accompanied with so much of ceremonial and publicity, that there can rarely be any difficulty in proving it. If there be any class of the community to whom it is otherwise, whose marriage notions and practices are so lax as to render many marriages of doubtful validity,

1879

In re PITAMBUR SINGH.

Statement.

seems to us additional reason for requiring the actual facts to be brought properly before the Court, so that it may determine the validity of the marriage in each case that comes before it.

The decision of the Full Bench (1) was as follows:—

We think it clear that in this case the evidence of the marriage is not sufficient to justify a conviction for adultery.

The marriage of the woman, as observed by the learned Judges who referred the case, is as essential an element of the crime charged as the fact of the illicit intercourse, and the provisions of the Evidence Act (section 50) seem to point out very plainly, that where the marriage is an ingredient in the offence, as in bigamy, adultery and the enticing of married woman, the fact of the marriage must be strictly proved in the regular way.

[CIVIL APPELLATE JURISDICTION.]

PROSUNNO COOMAR ROY CHOWDRY (DEFENDANT) . . . . . APPELLANT;

AND

HARAN CHUNDER CHATTERJEE (PLAINTIFF) . . . . . RESPONDENT.

1880 *January 22nd*

No. 748 of 1879.

Regulation XVII of 1806, *section* 8—*Mortgage, Foreclosure of—Property situated in different Districts.*

In foreclosure proceedings where the property mortgaged is situated in different districts, it is sufficient under Regulation XVII of 1806, section 8, for a notice of foreclosure to be issued by the Judge of either district.

Rasmoni Debea vs. *Pran Kishen Das*, 4 Moore I. A., 392, followed.

APPEAL from a decision passed by the Officiating Judge of Furreedpore, affirming a decision of the Subordinate Judge of that District.

The plaintiff in this case instituted proceedings for the purpose of foreclosing a mortgage executed by the defendant. At the

(1) GARTH, *C.J.*, and PONTIFEX, MORRIS and MCDONELL, *J.J.*

1880

PROSUNNO COOMAR ROY CHOWDHRY v. HARAN CHUNDER CHATTERJEE.

Judgment.

time of the foreclosure the mortgaged property was found to be partly in the district of Dacca and partly in that of Backergunj, and the notices required under Regulation XVII of 1806 were issued by the Judge of the latter district.

The plaintiff now sued in the Court of the Subordinate Judge of Furreedpore for possession of the mortgaged lands, and obtained a decree, which was affirmed on appeal by the District Judge.

The defendant thereupon preferred this second appeal to the High Court.

Baboo *Grija Sunkur Moozoomdar*, and Baboo *Bungsheedhur Sen*, for the Appellant.

Baboo *Kashee Kant Sein*, for the Respondent.

The judgment of the High Court (1), which was as follows, was delivered by

JACKSON, *J.*

JACKSON, *J.* :—

The point in question here, viz., as to the authority of the District Court to issue the notice of foreclosure under section 8, Regulation XVII of 1806, has been, as pointed out by Baboo Kashee Kant Sen, who appears for the respondent, authoritatively settled by the Judicial Committee in the Privy Council in a case to be found in 4 Moore's Indian Appeals, 392—*Rasmoni Debea* vs. *Pran Kishen Das*, and unless there were absolute legislative provisions to the contrary, we should certainly follow that ruling, and I may be permitted to add, the reason of it appears unquestionable. The property mortgaged in this instance lay partly, perhaps originally wholly, within the district of Backergunj, and the instrument of mortgage, we understand, was registered in that district. Clearly, therefore, that was the proper Court to apply for proceedings in foreclosure. The appeal is dismissed with costs.

(1) JACKSON and TOTTENHAM, *J.J.*

THE END OF VOLUME V.

of citation of the volumes of the CALCUTTA LAW REPORTS will be as follows :—

1 C. L. R., 100.

INDEX.

of rent, Suit for—*Delay.*] In ›red into negociations with respect se of a certain talook at a premium and an annual rent of Rs. 48,070, ary 1860, he signed a sale-bund ed an enumeration of the mouzahs e actual sale being completed in e following. Until his death in 61, he paid the stipulated rent the terms of the deed. Subse- ridow brought a suit for abatement on the ground that her husband sled as to the amount of rent pay- nder-tenants. *Held*, (affirming the he High Court of Calcutta) that cumstances the suit could not be DARIMBYA DEBBYA *v.* NIL MONEY 465

of suit on death of sole plain- ›cree—*Civil Procedure Code, sec-* 55, 372—*Limitation Act, XV of , Art.* 171.] A sole plaintiff having cree, an application was made more after his death by his legal re- or an order that his name might d on the record for that of the tiff, and that a sum of money to iginal plaintiff, if alive, would have might be paid to him, the legal . *Held*, that section 372 of the re Code did not apply to the case, ontemplating a proceeding before ation of the suit, and further that n was barred by Act XV of 1877, 171. *Held*, also, that section 232 cation. Section 365 of the Civil de, (amended by Act XII of 1879, es not apply to the case of a sole g after decree, the right to sue in the decree. KALLY CHURN HUGGOBUTTY CHURN MULLICK 108

state. See HINDU LAW ... 556

tutual. See LIMITATION ACT (XV) SCH. II, ART. 85 ... 211

formed during term of lease vernment, Right to Rent of. IVION... 192

843, sections 2 and 3. See MAHO- AN LAW 11

1858, section 3. See MINORS 361

Act XL of 1858, section 12. See MITAK-SHARA JOINT ESTATE 112

—— XL of 1858, section 18, Effect of sanction under. See MINORS... ... 374

—— XXVII of 1860. See MINOR ... 517

—— XLV of 1860, section 497. See ADULTERY 597

—— X of 1865, section 4. See JUDICIAL SEPARATION, PETITION FOR ... 1

—— X of 1865, section 50. See SUCCESSION ACT 565

—— X of 1865. See REVIEW OF JUDGMENT OF COURT OF SMALL CAUSES ... 559

—— XXXVII of 1865, section 2. See SONTHAL PERGUNNAHS, SUITS RELATING TO LANDS IN 128

—— XX of 1866, section 17. See REGISTRATION 341

—— IV of 1869, section 7. See JUDICIAL SEPARATION, PETITION FOR ... 1

—— VIII (B.C.) of 1869, section 29. See SUIT FOR RENT 62

—— **VIII (B.C.) of 1869, section 37**—*Measurement of Lands—Co-sharers—Notice of intended measurement.*] The words "the person claiming the right to measure" in section 37 of Act VIII (B.C.) of 1869 must be read as implying the sole proprietor or whole body of proprietors of the land for the measurement of which application is made. Where, therefore, there are joint proprietors, the notice of an intended measurement of the lands must be a notice of all the joint proprietors. It is not sufficient that one co-sharer should give notice and make his co-sharers parties to the suit. See SANTEE RAM PANJAH *v.* BYCUNT PARYA, 19 W. R., 280; PEAREE MOHUN MOOKERJEE *v.* RAJ KRISTO MOOKERJEE, 20 W. R., 385; and MOOLOOK CHAND MUNDUL *v.* MODHOOSOODUN BACHUSPUTTY, 16 W. R., 126. ISHAN CHUNDER ROY *vs.* BUSARUDEEN 132

—— **sections 38 & 39**—*Procedure—Appeal.*] There is no appeal against an order made by the Civil Court, under section 38 of Act VIII (B.C.) of 1869, directing the measurement of lands. CROWDY *v.* GOBURDHUN ROY, 22 W. R., 491, followed. GOLUCK KISHORE ACHARJEE *v.* KESHA MAJEE

Act—*continued.*
15 W. R., 23; and MUNOO DASEE *v.* ISHAN CHUNDER BANERJEE, *v.* 245, cited. KALLY CHURN DUTT *v.* PROTAB CHUNDER GHOSE 484

—— VIII (B.C.) of 1869, section 52. Suit under. See APPEAL 513

—— VIII (B.C.) of 1869, section 102. See APPEAL 135

—— VII of 1870, Sch. I, No. 10. See ADMINISTRATION... 368

—— VI of 1871. See SONTHAL PERGUNNAHS, SUITS RELATING TO LANDS IN ... 128

—— VIII of 1871, sections 49 and 60. See REGISTRATION 194

—— IX of 1871, Sch. II, Arts. 15, 92, and 145. See MINORS 374

—— IX of 1871, Sch. II, Art. 44. See LIMITATION 452

—— IX of 1871, Sch. II, Art. 110. See SUIT FOR RENT... 62

—— IX of 1871, Sch. II, Art. 118. See EXECUTION OF DECREE, QUESTION RELATING TO 45

—— IX of 1871, section 3. See LIMITATION ACT 543

—— I of 1872, sections 65, 74, and 114. See ACT IV OF 1875, SECTIONS 5 AND 14 331

—— I of 1872, section 50. See ADULTERY 597

—— IX of 1872, section 38. See TENDER... 105

—— X of 1872, sections 122 and 346. See CRIMINAL PROCEDURE CODE ... 238

—— X of 1872, section 220. See CRIMINAL PROCEDURE CODE 359

—— X of 1872, section 491. See CRIMINAL PROCEDURE CODE, SECTION 491 ... 66

—— X of 1872, section 530. See CRIMINAL PROCEDURE CODE 287

—— X of 1872, section 458. See CRIMINAL PROCEDURE CODE, SECTION 458 ... 574

—— X of 1872, section 530. See CRIMINAL PROCEDURE CODE 200

—— III of 1873, sections 34, 35, 74, 76, and 77. See REGISTRATION ACT ... 177

—— X of 1875, section 148 (C.) See PRIVILEGE FROM ARREST 170

—— **IV of 1875, sections 3, 4, 5**—17 *and* 18 *Vict., c.* 104, *section* 242—25 *and* 26 *Vict., c.* 63, *section* 23—*Special Court—Investigation of charges under section* 5 *of Act IV of* 1875—*Jurisdiction.*] Under section 5 of Act IV of 1875, the High Court in its Admiralty Jurisdiction may be authorized by the Local Government to investigate charges of incompetency or misconduct against holders of Board of Trade certificates, without respect to any power in any other tribunal to enquire into wrecks and casualties; and a Court, so authorised, is empowered under section 242 of the Merchant Shipping Act, 17 and 18 Vict, cap. 104, and section 23 of 25 and 26 Vict., cap. 63, to suspend or cancel such certificates. While the sections in Chap. II. of Act IV of 1875, subsequent to section 5, are applicable not only to the Court investigating charges under that section, but also to a special Court constituted under section 4, the local restrictions laid down in section 3 have no reference to investigations under section 5. An investigation already held by a special Court under section 4, where no charges have been preferred against individuals, is no bar to a second investigation into charges of misconduct or incompetency by a Court constituted under section 5. The conditions imposed by section 23 of Act 25 and 26 Vict., cap. 63, and by section 14, sub-section (a) of Act IV of 1875, are binding upon a Court constituted under section 5. The word "ordered" in these sections refers to orders, in England, by the Board of Trade, and, in India, by the Local Government. AVA AND BRENHILDA COLLISION, IN THE MATTER OF 307

—— **IV of 1875, sections 5 and 14**—*Investigation, Conditions precedent to—Evidence Act (I of* 1872), *sections* 65, 74, *and* 114—*Certificate of Board of Trade—Public Document—Secondary evidence of possession of Board of Trade Certificate.*] It is a condition precedent to an investigation under section 5 of Act IV of 1875, into charges of incompetency or misconduct that a copy of the statement of the case upon which the investigation was ordered, should have been served as required by section 14 of that Act upon the person whose competency or conduct is impugned, and also that such person should have had a certificate from the Board of Trade. A Board of Trade certificate, of which a duplicate is kept by the Registrar General of Seamen, is not a public document within the meaning of section 74 of the Evidence Act (I of 1872). Where such a certificate was lost, and evidence was tendered that it was a Master's certificate of a particular number, and issued at Liverpool, *Held*, that the case was met by clauses (*a*), (*c*) and (*f*) of section 65 of the Indian Evidence Act; that, although under clause (*f*) only a certified copy was admissible, the subsequent words, "In cases (*a*), (*c*) and (*d*) any secondary evidence is admissible," were too clear and strong to be controlled by anything that followed, and under them any secondary evidence might be received; and that, accordingly, the evidence tendered was admissible. *Held*, also, that the evidence of the number of the certificate, and of the fact that it was a seaman's certificate, was sufficient for the purpose of an investigation under section 5 of Act IV of 1875. *Semble.*—There is no difference between a document which may be proved by a certified copy

Act—*continued.*
and a document which is a duplicate of such document. AVA AND BRENHILDA COLLISION, IN THE MATTER OF (2) 331

—— I of 1877, section 9. See SPECIFIC RELIEF ACT 278

—— I of 1877, section 21. See SPECIFIC RELIEF ACT 284

—— IV of 1877, section 234. See INSOLVENT ACT, SECTION 13 458

—— IV of 1877, sections 234 and 235. See PRESIDENCY MAGISTRATES' ACT 21

—— X of 1877, Chap. XLII. See REVIEW OF JUDGMENT OF COURT OF SMALL CAUSES 559

—— X of 1877, section 13, expl. 1 (amended by Act XII of 1879, section 6). See RES JUDICATA 251

—— X of 1877, section 44, Rule (A.) See CIVIL PROCEDURE CODE 487

—— X of 1877, section 53. See PLAINT, AMENDMENT OF 455

—— X of 1877, section 224. See LIMITATION 548

—— X of 1877, section 232. See CIVIL PROCEDURE CODE 253

—— X of 1877, sections 232, 365 and 372. See ABATEMENT OF SUIT ON DEATH OF SOLE PLAINTIFF AFTER DECREE ... 108

—— X of 1877, sections 294, 306, 307 and 308. See CIVIL PROCEDURE CODE ... 181

—— X of 1877, section 372. See CIVIL PROCEDURE CODE, SECTION 372 ... 569

—— X of 1877, section 375. See CIVIL PROCEDURE CODE 464

—— X of 1877, sections 440 and 462. See MINORS 361

—— X of 1877, section 642. See PRIVILEGE FROM ARREST 170

—— XV of 1877, Schd. II, Art. 45. See LIMITATION 452

—— XV of 1877, Schd. II, Art. 85. See LIMITATION ACT 211

—— XV of 1877, Schd. II, Arts. 89, 90, 120 and 144. See SAGAI MARRIAGE... 505

—— XV of 1877, Schd. II, Art. 120. See EXECUTION OF DECREE, QUESTION RELATING TO 45

—— XV of 1877, Schd. II, Arts., 139, 142 and 144. See LIMITATION 527

—— XV of 1877, Schd. II, Art. 171. See ABATEMENT OF SUIT ON DEATH OF SOLE PLAINTIFF AFTER DECREE ... 108

—— XV of 1877, Schd. II, Art. 179, Cl. 4. See LIMITATION 515

Act—*continued.*
—— XV of 1877, Schd. II, Art 179 (4). See CIVIL PROCEDURE CODE (ACT X OF 1877,) SECTION 232 253

Acquittal. See CRIMINAL PROCEDURE CODE (ACT X OF 1872) SECTION 220... ... 359

Adjournment of proceedings under section 491 of Criminal Procedure Code, section 491. Effect of. See CRIMINAL PROCEDURE CODE, SECTION 491 ... 366

Administration—*Certificate, Application for, by two widows of intestate—Practice—Court Fees Act, VII of* 1870, *Sched. I, No.* 10—*Certificate of Administration, Court Fee Stamp on.*] Where the widows of an intestate applied for administration to the estate of the deceased. *Held*, that the District Judge before whom the application was made was right in following the usual practice (which was declared to be a reasonable practice) of his Court in refusing to grant such administration to the widows jointly. The Court fee stamp to be imposed on a certificate of administration ought not to be assessed on a valuation, including property absolutely denied by the applicants to belong to the intestate's estate until the contrary be proved. NITTYO KALI DEBEA *v.* KEDAR NATH CHATTERJEA 368

Adoption. See HINDU LAW 347

Adultery—*Evidence Act (I of* 1872*) section* 50—*Penal Code, Act XLV of* 1860, *section* 497—*Marriage, Evidence of.*] Where a marriage is an ingredient in an offence, as in adultery, bigamy and enticing away a married woman, it must be strictly proved. IN THE MATTER OF PITAMBUR SINGH ... ...

Adverse Possession. See LIMITATION 527

Agreement by natural father. See HINDU LAW 347

Alienations by father of Joint Family. See MITAKSHARA JOINT ESTATE 224

Aliense, Rights of. See MITAKSHARA JOINT ESTATE 224

Alluvion—*Accretions formed during term of lease from Government, Right to rent of.*] The lessee of a mouzah ordinarily being in the position of zemindar, a lessee holding lands from Government, in the absence of any stipulation in his lease to the contrary, is entitled to the benefit of all accretions formed upon such lands during the term of his holding, and may sue the occupants for a fair and equitable rent. MATURA KANTO SHAHA *v.* MEAJAN MUNDUL 192

2.——*Temporary assessment of lands gradually accreted to permanent tenure—River, Sudden change of—Usage governing rights of proprietors of contiguous estates divided by a River—Regulation XI of* 1825, *section* 2.] A temporary assessment of land gained by gradual

Alluvion—*continued.*
accretion through the change in the course of a river does not reduce the interest of the person with whom the assessment has been made to an estate of a temporary and limited character, where such accretion is permanent, as being an increment to an estate which is permanent. In 1837, land, which had gradually accreted to the plaintiff's zemindary on the north side of the river G., which separated two districts, was temporarily assessed at a low rate, the land then being scarcely culturable. In 1857, the value of the land having meanwhile increased, the settlement was renewed at a greater revenue. On the expiration of this settlement in 1857, the land, in consequence of a sudden change in the river G., was found capable of identification on the southern side of the river. There was no evidence of any usage within section 2 of Regulation XI of 1825, that the main channel of the river G. should be taken as the constant boundary, not only between the two districts, but also between the zemindaries on each bank divided by the river. *Held*, (reversing the judgment of the High Court—KEMP and BIRCH, *J.J.*,) that the plaintiff was entitled to the land, and to have a settlement made in respect of it. RUGHOOBUR DYAL SAHOO *v.* KISHEN PERTAB SAHEE ... 418

Appeal. See ACT VIII (B.C.) OF 1869, SECTIONS 38 AND 39 484

——— *Act VIII (B.C.) of* 1869, *section* 52, *Suit under—Suit for arrears of rent and ejectment of tenant—Act VIII (B.C.) of* 1869, *section* 102—*Jurisdiction—Execution proceedings.*] Where a suit is brought under section 52 of the Rent Law, Act VIII (B.C.) of 1869, for the recovery of arrears of rent and for ejectment of the tenant in default of payment of such arrears, and the amount claimed is under Rs. 100, an appeal is barred under section 102 of that Act. The proceedings in execution of the decree in such a suit are to be treated as part of the suit, and subject to the same rule as regards jurisdiction as the suit itself. PARBUTTY CHURN SEN *v.* SHAIKH MANDARI 513

——— **Grounds of Second.** See MISDIRECTION 94

——— **Right to withdraw petition of.**] A petition of appeal presented for admission may be withdrawn. CHUNDER NATH DEB, IN THE MATTER OF 372

Appellate Court. See EXECUTION OF DECREE 522

Arbitration, Agreement to refer to. See SPECIFIC RELIEF ACT, (I OF 1877,) SECTION 21 284

——— **Award**—*Partition—Right of way—Easement of necessity.*] Where the house and lands of a joint Hindu family were partitioned by the Court according to an award made by an arbitrator to whom the parties had agreed to refer the matter, *held*, in a subsequent suit that the Court could not go behind the award and allow one of the members of the family to claim a right of way from the family house to a public road, through the lands allotted by the award to another member, such right of way not having been granted by the award, and there being no such right of way of necessity. GOPAL CHUNDER ROY *v.* BROJENDRO COOMAR ROY 338

Assignment of surety bond. See BOND IN NAME OF JUDGE TO SECURE COSTS ... 524

Attachment. See HINDU LAW ... 296

Auction-purchaser, Right of, to insist upon partition of joint Estate. See MITAKSHARA 26

Bandhara Ceremony. See MUTH, SUCCESSION TO MOUROSI 73

Bank of Bengal. See PUBLIC DEBT OFFICE 586

Bar to Suit. See SPECIFIC RELIEF ACT (I OF 1877), SECTION 21 284

Benamidar, Suit in sole name of. See PARTIES 102

Benami. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 232 253

——— See EVIDENCE 470

——— See RENT SUIT 179

Bill of Lading, Construction of. See CARRIERS BY SEA 157

Birt Tenures. See MORTGAGE 213

Bond in name of Judge to secure Costs—*Practice of High Court—Assignment of surety bond—Rule Nisi.*] The proper mode of proceeding to enforce a security bond in the name of a Judge of the Court for the costs that may be incurred in a suit is to apply on petition for a rule *nisi*, calling upon the sureties to show cause why the party to whom the costs are payable should not be at liberty to bring a suit upon the bond in the name of the Judge as plaintiff, and to sign and verify the plaint and proceedings in the suit; or why the bond should not be assigned over by the Registrar of the Court to him for the purpose of being sued upon. POYNOR BIBEE *v.* NUJIB KHAN 524

Bond, Unregistered, how far admissible in evidence. See REGISTRATION ... 43

Breach of Peace. See CRIMINAL PROCEDURE CODE (ACT X OF 1872), SECTION 491 ... 361

Buildings erected by Tenants. See LANDLORD AND TENANT 499

Butwara, Evidence of. See PARTITION 257

Carriers by Sea—*Bill of Lading, Construction of—Loss by fire—Liabilities of Ship owners for Goods after being landed.*] Goods were shipped in the defendants' steamer, under a bill of lading which contained a clause protecting the ship-owners from loss occasioned by a fire, and a further clause to the effect that the goods "are to be landed from the steamer's tackle by the consignees as fast as the steamer can discharge, failing which, the steamer's agents are to be at liberty to land them into godowns,—the cost of lighterage, godown rent, etc., thereby incurred, to be borne by the respective consignees." The steamer duly arrived at its destination on the afternoon of the 11th December, and at once proceeded to discharge its cargo. It does not appear that notice of the arrival was given to the plaintiff, who was the consignee of the goods. On the 12th the plaintiff applied for delivery, but was informed that the goods had been landed into the godowns and delivery could not be given, as they were covered up by other cargo. On the evening of the 12th the godowns were burned down and the goods destroyed. In a suit by the plaintiff for damages for short delivery, *held*, that the defendants were entitled under the bill of lading, for the speedy discharge of the steamer, to land the goods, and that a reasonable time for delivery not having elapsed before the fire, they were also protected from the loss occasioned thereby, the goods being still in their custody as carriers. *Per* PONTIFEX, *J.*—The ship-owners, though entitled to land the goods, were not entitled to charge for landing and wharfing unless the plaintiff had had an opportunity of landing the goods himself. *Per* GARTH, *C.J.*—If the defendants were at liberty to discharge the goods into the godown, they were also entitled to charge wharfage dues. LEE PHEE CHUAN *v.* CASSIM HOSSEIN SOORTY 157

Cause of Action. See RIPARIAN OWNERSHIP 97

——————**partly arising outside Jurisdiction.** See JURISDICTION ... 268

Certificate, Application for, by two widows of intestate. See ADMINISTRATION 368

——————**of Administration, Court fee stamp on.** See ADMINISTRATION ... 368

——————**of Board of Trade.** See ACT IV OF 1875, SECTIONS 5 AND 14 331

——————**to Collect Debts.** See MINOR 517

Chur land—*Island—Parties—Suit to recover, Chur lands claimed by Government as an Island, settled with Defendants.*] Plaintiff brought suit for recovery of possession of land which had been thrown up by a large navigable river which he alleged formed an accretion to his estate. The defendant who was in possession claimed to hold the lands under a settlement with the Government had made with his predecessors in title, the Government having three

Chur land—*continued.*

years previously taken up the lands as forming an island. *Held*, that the Government, as claiming a proprietary right in the disputed land, was a necessary party to the suit. The date on which land thrown up by a navigable river must be taken to be an island, and as such resumable by the Government, is not the date of the settlement, but the date of the original formation of the lands. BUDROONISSA CHOWDHRAIN *v.* PROSUNNO COOMAR BOSE, 14 W. R., (F. B.) 25, cited and followed. CANNON *v.* BISSONATH ADHICARI... 154

Civil Procedure Code (ACT X OF 1877), SECTION 44, RULE (A)—*Suit for specific performance of Contract to sell land—Suit for recovery of immoveable property—Joinder of causes of action—Contract, Admissibility of Parol Evidence to vary written—Evidence.*] In a suit for specific performance of a contract to sell a share in a house and premises the plaintiff also sought to recover a sum of money due from the defendant on promissory notes. *Held*, that the suit was not a "suit for the recovery of immoveable property or for declaration of title to immoveable property" within the meaning of section 44, Rule (a) of the Civil Procedure Code, and that the cause of action in respect of the promissory notes, which had been joined without the leave of the Court was not improperly joined. DELHI AND LONDON BANK *v.* WORDIE, I. L. R., 1 Cal., 249, cited and commented on. Where the plaint, in a suit for specific performance of a contract to sell a certain share of a house, set out a written contract, and alleged that, on its having been subsequently discovered that the share was less than it was originally believed to be, the price was reduced by verbal agreement, *held*, that the written contract must be taken as intact save as to the price, and that no evidence could be given by the defendants in contradiction of the other terms of the document. DARMOODIE PAIK *v.* KAIM FARIDAR, 4 C. L. R., 419 followed. *Per* WILSON, *J*—Under section 44, Rule (a), of the Code of Civil Procedure, a suit for the recovery of immoveable property, &c., is a suit founded upon an existing title in which the plaintiff seeks to get possession of the property. The words "to obtain a declaration of title" apply to a case where a title exists, and the plaintiff seeks to have that fact declared. BROWN, T. F. *v.* G. M. CUTTS 487

——————(ACT X OF 1877), SECTION 53. See PLAINT, AMENDMENT OF ... 455

——————(ACT X OF 1877), SECTIONS 121, 125, 127 AND 136. See INTERROGATORIES, APPLICATION TO STRIKE OUT 509

——————(ACT X OF 1877), SECTION 224. See LIMITATION 548

——————(ACT X OF 1877) SECTION 232—*Transferee of Decree—Benami—Limita-*

Civil Procedure Code—*continued.*
tion Act, XV of 1877, *Sch. II, Art.* 179 (4).] Where an application for execution of a decree made under section 232 of the Civil Procedure Code was disallowed on the ground that the applicants had not shown, as they alleged, that they were the persons beneficially interested in a transfer of the decree taken in the benami name of a third person, and within three years from the date of such application a subsequent application was made by them, in which their allegation was proved to be correct, *Held* that the former application had been a proper application within the meaning of the section, and that the latter was therefore, under Art. 179, Sch. II of the Limitation Act (XV of 1877), within time. ABDUL KUREEM *v.* CHUKHUN ... 253

——————, SECTIONS 232, 365, AND 372. See ABATEMENT OF SUIT ON DEATH OF SOLE PLAINTIFF AFTER DECREE ... 108

—————— (ACT X OF 1877), SECTIONS 294, 306, 307, AND 308—*Deposit made by purchaser of immoveable property—Option of set-off when exercised—Waiver of deposit in Cash.*] The requirements of section 306 of the Civil Procedure Code applying to all cases of sale of immoveable property, under Chapter XIX, a decree-holder buying with permission given, under section 294, and desiring to set-off his purchase-money against the amount of the decree, is not exempt from the necessity of making, at the time of sale, a deposit of 25 per cent. on the amount of such purchase-money; and such deposit must be made in cash. The option so to set-off the purchase-money cannot be exercised by the purchaser until the confirmation and payment of expenses of the sale. Where, however, all parties interested in the amount to be deposited have waived their right to have that amount deposited in cash, the sale ought not to be set aside on the ground that a cash deposit has not been made. GOPAL SINGH *v.* ROY BUNWAREE LALL SAHU 181

——————(ACT X OF 1877), SECTION 372—*Revivor—Death of Parties—Practice—"Pending Suit."*] Where a suit is capable of revival, and there are no parties living whose consent may be obtained, or to whom notice may be given as required by section 372 of the Code of Civil Procedure, the Court may give leave to revive the suit without any such consent or notice. *Per* PONTIFEX, *J.*—A suit in which there has been a decree, that a scheme for the purpose of carrying out certain trusts should be settled, but which scheme has not been proceeded with, may be treated as a pending suit within the meaning of section 372 of the Code. GOCOOL CHUNDER GOSSAMI *v.* THE ADMINISTRATOR-GENERAL OF BENGAL... 00

——————ACT X OF 1877, SECTION 375—*Practice of High Court—Consent Decree.*] According to the practice of the High Court, a consent decree upon a compromise will not be granted, unless the suit be entered in the defended or undefended Cause list of the Court. PELL *v.* VALETTA 464

——————, ACT X OF 1877, SECTIONS 440 AND 462 361

Condonation. See CONJUGAL RIGHT, SUIT FOR 65

Confession. See CRIMINAL PROCEDURE CODE, SECTIONS 122 AND 346 ... ... 209, 238

Conjugal Right. Suit for—*Condonation.*] A suit for restitution of conjugal rights may be maintained by Hindus in this country, although the same state of circumstances, which would justify such a suit, or would be an answer to such a suit, in the case of a European, may not be equally a justification or an answer in the case of a Hindu. S. M. JOGENDRONUNDINEE DOSSEE *v.* HURRY DOSS GHOSE 65

Consent Decree. See CIVIL PROCEDURE CODE, SECTION 375 464

Co-sharers. See ACT VIII (B. C.) of 1869, SECTION 37 132

—————— See ENCHANCEMENT OF RENT 545

Construction of Deed—*Rent Charge.*] The defendants' ancestor granted to A and B an ikrarnamah in the following terms:—"In consideration of Rs. 4,952 due by me to you, and in lieu thereof I do hereby grant and alienate to A and B, out of the whole and entire profits of my proper share in Mouzah X, the sum of Rs. 600 per annum, in equal proportion, free from all incumbrances, and constitute them part owners thereof. The said A and B shall be at liberty to make joint collection with me, and to receive and enjoy in perpetuity Rs. 600: or upon division and partition of as much land as may yield to them Rs. 600, to make separate collection as from their own property. * * * If in any way by sale, etc., the said mouzah shall cease to be my property, I agree to set apart, upon partition and division for A and B, as much land as may yield Rs. 600 in another of the mouzahs owned by me exclusively, and to that also the same conditions as above shall be applicable." A applied to have his name registered as owner of a share in the mouzah sufficient to yield an income of Rs. 300 per annum. *Held*, that under the ikrarnamah A had only a rent charge on the property. MAHOMED ZAHUR ALUM *v.* CHUNDER CUMAR 449

Construction of Sunnud—*Impartible Zemindary—Partition—Succession by widow.*] The owner of an impartible zemindary, which, though forming part of the family property, had, by ancient custom, been held and enjoyed by the eldest male member in the direct line, died leaving four sons and an infant grandson, A, by his eldest son, who had predeceased him. During

Construction of Sunnud—*continued.*
the minority of that grandson the four surviving sons executed a sunnud which, after reciting certain arrangements made by their father, directed that "the zemindary should be held by A, the son of the eldest son * * * A and we four also shall take in equal shares the inam lands; * * until A attains his proper age, we all should jointly manage the affairs of the said zemindary. * * * After A attains his proper age the zemindary of the inam lands allotted to him should be delivered over to him and each should confine himself to the share allotted to him." Certain jewellery was also divided in similar manner. A died leaving a son C, who died in 1865 without issue, but leaving a widow. *Held* (reversing the decision of the High Court of Madras) that the sunnud amounted to an agreement by which the joint family was divided, and that on the death of C his widow was entitled to the zemindary. PERIASAMI *v.* PERIASAMI, L. R. 5 I. A., 61, cited. VADREVU RANGANAYAKAMMA *v.* VADREVU BULLI RAMAIYA 439

Constructive Possession. See CRIMINAL PROCEDURE CODE (ACT X OF 1872), SECTION 530 287

Costs of wife. See JUDICIAL SEPARATION, PETITION FOR 1

Consent of Adult Members of Joint family. See HINDU LAW 575

Contract Act (IX of 1872), section 1. See LANDLORD AND TENANT 492

——— ——— ——— **section 38.** See TENDER 105

———. **Admissibility of Parol Evidence to vary written.** See CIVIL PROCEDURE CODE, ACT (X OF 1877), SECTION 44, RULE A 487

Court Fees Act (VII of 1870), Sched. I, No. 10. See ADMINISTRATION ... 368

Criminal Procedure Code, Act X of 1872, sections 122 and 346—*Confessions—Evidence.*] Section 122 of the Criminal Procedure Code (Act X of 1872) does not apply to a confession recorded by a Magistrate acting under Chap. XV or Chap. XVII, but to a confession made by a Magistrate other than the Magistrate by whom the case has to be enquired into or tried; and to a confession made during, or before the commencement of an investigation by the police. BEHARI HAJDI, IN THE MATTER OF 238

——— ——— ——— **sections 122 and 346**—*Confession.*] A defect in a confession taken under section 122 of the Code of Criminal Procedure cannot be remedied, as in the case of an examination of a prisoner under section 346, by evidence taken at Sessions. EMPRESS *v.* HARI KINTO BISWAS... 209

——— ——— ——— **(Act X of 1872), section 220**—*Acquittal.*] An order dismissing a complaint under section 220 of the Code of Criminal Procedure amounts to an acquittal. JADUBAR MOOKERJEE, IN THE MATTER OF... 359

Criminal Procedure Code—*continued.*

——— ——— ——— **(Act X of 1872), section 458**—*Procedure—Evidence of one prisoner against another tried jointly.*] Where two prisoners are tried together for different offences committed in the same transaction, it is improper and illegal to examine one prisoner as a witness against the other. A. DAVID, IN THE MATTER OF ... ...

——— ——— ——— **(Act X of 1872), section 491**—*Breach of peace—Adjournment of Proceedings, Effect of—Discharge.*] An order postponing proceedings instituted under section 491 of the Code of Criminal Procedure (Act X of 1872) until the person called upon to show cause shall have established in a Civil Court the title claimed by him to the property disputed, with reference to which there is a likelihood of a breach of the peace, amounts to a discharge. EMPRESS *v.* DHUNIRAM 366

——— ——— ——— **(Act X of 1872), section 530**—*Constructive Possession—Possession through ticcadars.*] Section 530 of the Code of Criminal Procedure contemplates disputes between owners as well as occupiers. *Per* JACKSON, *J.*:—Where a zemindar has let his lands in farm, he, his farmers, and the occupying ryots are all, in their degree, concerned in any dispute as to possession which may arise, and they ought to be maintained in possession of the interests which they severally enjoy. SUTHERLAND *v.* CROWDY, 18 W. R., 11, cited; EMPRESS *v.* THAKOOR DOYAL SINGH, I. L. R., 3, Cal., 320, commented upon as having gone too far. HARAK NARAIN SINGH *v.* LUCHMI BUX ROY ... 287

——— ——— ——— **(Act X of 1872), section 530**—*Possession, Symbolical, under decree of Civil Court, Effect of—Jurisdiction.*] A certain mouzah having been sold in execution of a decree obtained upon a mortgage, the purchaser claimed a right under the sale to a haut appurtenant to the mouzah, and was put by the Nazir of the Civil Court into symbolical possession of the haut as well as of the mouzah. The judgment-debtor refused to give up actual possession of the haut, maintaining that it was debutter property of which he was the shebait. A breach of the peace being imminent in consequence of the rival claims, proceedings were taken under section 530 of the Criminal Procedure Code, and the Magistrate finding that the judgment-debtor was in actual possession of the haut made an order maintaining him in such possession until ousted by a Civil Court. *Held*, (setting aside that order) that the Magistrate had no power under section 530 of the Criminal Procedure Code, to direct the judgment-debtor to be retained in possession until ousted by a Civil Court, but was bound to see that the

Criminal Procedure Code—*continued.*
possession, as given by the Nazir, was maintained, leaving it to the debtor to substantiate his claim as shebait in a Civil Court. The Court accordingly directed that the purchaser be restored to possession, and that the Magistrate do see that he is kept in possession until ousted by due course of law. IN THE MATTER OF CHUTRAPUT SINGH 200

Cross-Examination of witnesses called by the Court.] The Court ought not to refuse to allow the cross-examination of a witness called by it. IN THE MATTER OF GRISH CHUNDER TALOOKDAR 364

Cross Interrogatories. See INTERROGATORIES 171

Customs of Muths. See MUTH, SUCCESSION TO MOUROSI 73

Damages, Assessment of, for non-performance of sub-contract.] Plaintiff, who had contracted to take the whole tonnage of a steamer from B. & Co. at Re. 1-4½ per bag, re-let part of the tonnage to the defendant, who agreed to ship 680 bags, paying freight at Re. 1-6 per bag from C. to T. The defendant having failed to perform any part of his contract, the plaintiff sued to recover damages for the non-performance. The ship never started on its intended voyage from C. to T., having been unable to obtain a cargo. *Held*, that the plaintiff was entitled to recover as damages, a sum equivalent to the entire freight agreed to be paid by the defendant for 680 bags from C. to T. after deducting therefrom a proportionate part of the expenses of carriage which had been saved by reason of the ship not having performed the intended voyage. *Per* CURIAM.—The damages payable by the defendant must depend upon his own contract with the plaintiff, and not upon the terms of the bargain which the plaintiff may have made with B. & Co. DE ANGELIS *v.* C. K. MAYAPA SETTY 57

Death of Parties. See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 372... 569

Death illness, Gift made during. See MAHOMEDAN LAW OF GIFT 91

Decree, Addition to, or alteration of. See EXECUTION OF DECREE... 522

——by Consent. See CIVIL PROCEDURE CODE, SECTION 375 464

——Right of purchaser under, to recover property deposited with creditors. See INSOLVENCY... 430

——Execution of, against joint family Property. See JOINT DEBT 477

——superseded. See MONEY PAID IN EXECUTION OF DECREE, SUIT TO RECOVER 519

Delay. See ABATEMENT OF RENT, SUIT FOR 465

Denial of Execution of Document. See REGISTRATION ACT (III OF 1877), SECTIONS 34, 35, 73, 74, 76, AND 77 172

Deposit made by Purchaser of immoveable Property. See CIVIL PROCEDURE CODE, (ACT X 1877) SECTIONS 294, 306, 307 AND 308 181

Devise to Married Women. See HINDU LAW 556

Discharge. See CRIMINAL PROCEDURE CODE, SECTION 491 366

Discontinuance of possession. See LIMITATION 527

Distribution in lifetime of Father, Share of widow in case of. See HINDU LAW 576

Division, Death of plaintiff before. See HINDU LAW 6

——— Mode of. See PARTITION ... 257

Divorce Act (IV of 1869), section 7. See JUDICIAL SEPARATION, PETITION FOR ... 1

Divorce under Mahomedan Law, Effect of. See PRESIDENCY MAGISTRATES ACT (IV OF 1877), SECTIONS 234 AND 235, POWERS OF MAGISTRATE UNDER 21

Document, Refusal to attend and admit Execution. See REGISTRATION ACT (III OF 1877), SECTIONS 34, 35, 73, 74, 76 AND 77 172

Documents thirty years old. See EVIDENCE ACT (I OF 1872), SECTION 90 135

Domicile. See LIMITATION ACT (IX OF 1871), SECTION 3 543

Easement. See RIPARIAN OWNERSHIP ... 97

Easement of necessity. See ARBITRATION AWARD 338

Ejectment Suit. See APPEAL 513

——— ———. See NOTICE TO QUIT ... 231

Emancipated Slave, Inheritance from. See MAHOMEDAN LAW 11

Encumbrances, Purchase of, by Mortgagee. See MORTGAGE 213

Enhancement of Rent.—In a suit by the mother of the then zemindar of a taluq for enhancement of rent, a decree was made in 1821, in terms of a compromise, enhancing the rent from Rs. 1,600 to Rs. 2,000. A subsequent suit, in which rent was claimed at Rs. 3,200, was finally decided in 1862, the compromise being thereby set aside, and the liability of the taluq to enhancement finally established. The Ameen's report, which fixed the rent payable at Rs. 8,124, was not, however, made until 1869. In a suit to recover rent at Rs. 8,124 for the year 1871-72 the Subordinate Judge gave a decree for Rs. 5,062-15-6, a re-measurement of the taluq having shown a

Enhancement of Rent—*continued.*
decrease in the amount of culturable land. *Held*, reversing the decision of the High Court, that the Subordinate Judge was right in making such a decree. SUBUT SOONDARI DEBYA *v.* PRANGOBIND MOZOOMDAR 262

——————*Parties—Co-sharers.*] A suit by one of several co-sharers for enhancement of the rent of his own share will not lie, although he may have been in the habit of recovering the rents of his own share separately, and have joined his co-sharers as defendants. SHEIKH GUNI MAHOMED *v.* MORAN, and DOORGA PROSAD MYTEE *v.* JOYNARAIN HAZRAH, 2 Cal. L. R., 370, S. C., I. L. R., 4 Cal., 96, followed. See also RAJENDRO NARAIN BISWAS *v.* MOHENDER LALL MITTER, 3 Cal. L. R., 21. BHARUT CHUNDER ROY *v.* KALI DASS DEY 545

——————*Prevailing rate of Rent—Equitable Rate.*] In a suit for enhancement of rent on the ground that the defendant pays at a lower rate than that paid by the neighbouring ryots of the same class for similar lands, if it be found that the prevailing rate is higher than the rent paid by the defendant, though lower than the rate claimed in the plaint to be the prevailing rate, the Court ought to give a decree at the actual rate found to be paid by the neighbouring ryots. AKUL GAZEE *v.* AMEENOODDEEN 41

——————**of tenure on ground of area being increased by alluvion**—*Permanent Settlement, Enhancement of lands not subject of—Regulation XI of* 1825—*Government, Position of, under Rent Laws.*] Where the area of a tenure is increased by alluvion, the proper remedy of the landlord is not to sue for enhancement of the rent under the Rent Laws, but, under section 4 of Regulation XI of 1825, to sue for an additional rent for the alluviated lands. Such additional rent cannot be considered as forming part of the rent of the original tenure. In a suit for enhancement it is not necessary to show that the land, the rent of which it is sought to enhance, has been subject of permanent settlement. In such a suit, the Government, as against the ryots, is in no better position under the Rent Laws than other landlords. SUDANUNDO MYTEE *v.* NOWRUTTON MYTEE, 16 W. R., 289, followed. GOPI MOHUN MOZOOMDAR *v.* A. HILLS 33

Equity. See JOINT FAMILY PROPERTY ... 176

——— See MORTGAGE 227

Equitable Rate. See ENHANCEMENT OF RENT 41

Estoppel.—*Evidence Act, sections* 2, 115, 116, 117.] C. and Co. contracted to buy from the defendants a large quantity of gunny bags, payment to be made on delivery. On the 22nd July 1878, there remained undelivered 101,500 bags, but on that day C., of the firm of C. and Co., informed the Agents of the defendants that he had arranged to take delivery of 51,500, and he made a further purchase of 30,000 twilled bags. On the following morning delivery orders were granted for the 51,500 and the 50,000 twilled bags. In the afternoon C. called on the Agents of the Company and handed them an open letter from C. and Co. to the Agents in the following terms:—"With reference to your delivery orders Nos. 45 to 52 for 51,500 C. bags and Nos. 53 to 55 for 30,000 H. twills, we have handed the delivery orders to Baboo Roop Chand Somair Mull, to whom you will please deliver the bags as may be required." C. said that arrangements had been made to take the bags, and he wished them to be personally delivered to R., whom he had brought with him. (R. was the representative of the plaintiffs). At C.'s request, the Agents wrote the following words upon the letter: "The bearer of this will personally take delivery of each lot as required." No conversation took place with R. On the strength of that order the plaintiffs advanced Rs. 15,000 to C. and Co., and a large portion of the bags was delivered to the plaintiffs under the order, without their being required to pay for them on delivery. C. and Co., having become insolvent, the defendants refused to deliver any more bags. *Held* (affirming the decision of the Court below), that the defendants were estopped from receding from the arrangements entered into by their Agents. Section 2 of the Evidence Act, which repeals all rules of evidence not contained in the Act itself, does not debar the Courts in India from entertaining questions in the nature of estoppel not coming within the scope of Chap. VIII. GANGES MANUFACTURING CO. *v.* SOORUJMULL ... 533

Evidence. See CRIMINAL PROCEDURE CODE, SECTIONS 122 AND 546 238

——— **How far unregistered bond admissible in.** See REGISTRATION... 43

——— *Sale in execution—Benamee—Judgment-debtor—Purchase for.*] Evidence raising presumption of purchase at a sale in execution being made *benamee* for the judgment-debtor discussed. [Judgment of the High Court at Calcutta reversed.] RAM CHUNDER BYSACK *v.* DINONATH SURMA SIRKAR ... 470

——— See CIVIL PROCEDURE CODE (ACT X OF 1877) SECTION 44, RULE A ... 487

——— **of one prisoner against another tried jointly.** See CRIMINAL PROCEDURE CODE (ACT X OF 1872) SECTION 548... 574

——— **Act (I of 1872) section 50.** See ADULTERY 597

——— **sections 2, 115, 116, and 117.** See ESTOPPEL 533

——— **(I of 1872), sections 65, 74, and 114.** See ACT IV OF 1875, SECTIONS 5 AND 14 331

Evidence Act (I of 1872), section 90—*Document 30 years old—Presumptions.*] In applying the presumption allowed by section 90 of the Indian Evidence Act, the period of 30 years is to be reckoned, not from the date upon which the document is filed in Court, but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof. MINU SIRKAR *v.* RHEDOY NATH ROY 135

——— **section 110.** See POSSESSION, SUIT FOR... 278

Execution of Decree—*Decree, Addition to, or alteration of—Appellate Court.*] It is not competent to the Appellate Court in a matter arising in execution to add to, or alter the decree. BECHARAM PAUL *v.* BRUGWAN CHUNDER GHOSE 522

——— **against joint family property.** See JOINT DEBT... ... 477

——— **Sale in.** See EVIDENCE ... 440

——— **for possession merely.** See STAY OF PROCEEDINGS PENDING APPEAL SUBSEQUENTLY DISMISSED ... 189

——— *Insolvency—Decree, Right of purchaser under, to recover property deposited with creditors.*] A member of a firm of Native Bankers which had become insolvent, with a view to protect his property from the general body of his creditors, in March 1870, deposited property to the value of Rs. 30,000 with the appellants, another firm of Bankers, to whom he owed Rs. 1,500. In April 1871, the appellants brought an action against him for Rs. 500, the balance of that debt, and obtained a decree, in execution of which the property was put up for sale and purchased by the respondent. *Held* (affirming the decision of the High Court of the North-Western Provinces), that the respondent was entitled to the property. DWARKA DASS *v.* RAI SITA RAM 430

——— *Mesne profits, Pro-forma defendant not liable for.*] Where, in a suit for possession and mesne profits, no specific mention as to mesne profits is made in the decree, (the decree merely declaring that the plaintiff's suit be decreed), the Court executing the decree must look to the plaint to see from whom the relief granted is to be obtained, and ought not to allow execution to issue against a *Pro-forma* defendant against whom no relief was claimed. MONAJAN *v.* KASHI NATH PANDAY 305

——— **Proceedings in aid of.** See LIMITATION... 515

——— **Question relating to**—*Joinder of Causes of Action—Limitation—Act IX of 1871, Sch. II, Art. 118—Act XV of 1877, Sch. II, Art. 120.*] The plaintiffs, who were the heirs of R, on the death of his widow, brought a suit to set aside a mocurrari created by her, and to recover possession of the lands leased under the mocurrari, and obtained a decree in June 1878. Subsequently, on delivery of possession being given, the plaintiffs discovered that portion of the lands had been taken by the Government for public purposes, and that a sum of money awarded by way of compensation had been withdrawn from the Treasury by the defendants in March 1872. In September 1875, they brought a second suit to recover this sum. It was dismissed by the Court of First Instance, on the ground that it was barred by section 7 of Act VIII of 1859, and again on appeal by the lower Appellate Court on the ground that the point to be decided was a question "relating to the execution of a decree" and ought to be determined by the Court which executed the decree. *Held*, that the suit was not barred by section 7 of Act VIII of 1859, inasmuch there was no cause of action in respect of the compensation money at the time of bringing the first suit, and also that the question to be decided did not relate to the execution of a decree. *Held*, further, that the period of limitation applicable to the suit was six years from the date of the cause of action, as provided by Art. 118 of Act IX of 1871, (corresponding with Art. 120 of Act XV of 1877). ROY NUND LALL BOSE *v.* MIR ABU SYED... 45

——— **Sale in.** See JOINT HINDU FAMILY (MITAKSHARA) ... 36

Execution Proceedings. See APPEAL 513

Full Bench.—*Adultery—Evidence Act (I of 1872) section 50—Penal Code, Act XLV of 1860, section 497—Marriage, Evidence of.*] Where a marriage is an ingredient in an offence, as in adultery, bigamy, and enticing away a married woman, it must be strictly proved. IN THE MATTER OF PITAMBUR SINGH 592

2. ——— *Limitation Act, IX of 1871, section 3—Majority—Domicile.*] For the purposes of the Limitation Act, IX of 1871, no person, whatever his domicile may be, is protected from the operation of the Act beyond the age of 18, and the three years of grace given by that Act. I. R. RAINEY *v.* NOBO COOMAR MOOKERJEE 543

3. ——— *Limitation—Symbolical possession—Civil Procedure Code (Act X of 1877), section 264.*] Where a plaintiff has obtained a decree for possession of immoveable property which is in the occupation of ryots, and in execution thereof has been put in symbolical possession in the manner prescribed by section 224 of the Code of Civil Procedure, he is entitled to maintain a suit against the defendant for the recovery of the same land within 12 years from

Full Bench—*continued.*

the date of such symbolical possession. JOGOBUNDHU MOOKERJEE *v.* RAM CHUNDER BYSACK 548

Gift, Construction of Deed of—*Succession.*] A, a Hindu, executed a deed of gift of certain villages in favour of his wife in the following terms :—"The undermentioned villages have been granted as a gift to the Maharani for her necessary deohri expenses." The wife died a childless widow. *Held*, that the gift from her husband was for life only, and that the villages in question were not liable, in the hands of her husband's heirs, to her debts. *Held*, also, the husband's heir was entitled to her moveable property as her heir, and that such property was in his hands chargeable with her debts. SHEOTUHUL RAM *v.* NAM NARAIN SINGH 291

Gift of joint property by one of two Members of joint family to the other. See MITAKSHARA JOINT ESTATE ... 112

Gift to a class. See WILL, CONSTRUCTION OF 496

Gift to wife. See HINDU LAW ... 561

Government. Position of, under Rent Laws. See ENHANCEMENT OF RENT OF TENURE ON GROUND OF AREA BEING INCREASED BY ALLUVION ... 33

High Courts Criminal Procedure Code, Act X of 1875, section 148 (c.) See PRIVILEGE FROM ARREST... ... 170

Hindu Law—*Adoption—Agreement by natural father—Ratification.*] An agreement by the natural father that his son should be adopted by a widow on the understanding that he should inherit part only of the estate of the deceased husband is not void, but may be ratified by the son upon his attaining majority. [Decision of the High Court at Madras reversed.] RAMASAWMI AIYAN *v.* VENCATARAMA AIYAN ... 347

2.————*Devise to Married Women—Absolute Estate.*] The rule of Hindu law by which widows take only a qualified estate in their husband's property has no application to a devise under a will to married women. CHUNDERMONEY DOSSEE *v.* HURRY DOSS MITTER 556

3.————*Mitakshara joint family—Mortgage of joint property by father—Mortgage suit—Parties—Consent of adult members of family—Distribution in life time of father, Share of widow in case of.*] The liability of sons under Mitakshara Law to pay the debts of their fathers not incurred for immoral purposes is a liability either attaching to them personally, or to be satisfied in the due course of administration, and there is no authority for saying that a judgment-creditor of the father in respect of the father's separate debt can, either in the father's lifetime

Hindu Law—*continued.*

or afterwards, attach or take any specific portion of the ancestral property beyond the father's own proportionate share, without having made the other members of the family parties to the suit. *Quære*—Whether in cases of necessity the father, as managing member of a Mitakshara joint family has authority to affect the interests of the adult members of the family without their consent. A mortgage by the father of a Mitakshara family and sale in execution in a suit thereon during his lifetime is a distribution within the meaning of verses 1 and 2 of section 7 of Chapter I of the Mitakshara, and therefore his widow, where there was no necessity for the mortgage, is entitled to an equal share with her husband and sons. PURSIDH NARAIN SINGH *v.* HANUMUN SAHOY 1

4.————*Partition, Suit for—Division, Death of plaintiff before.*] In a suit for partition of a joint zemindary by one of two brothers, against the other and against certain other persons who claimed to be either encumbrancers upon, or absolute owners of different villages within the zemindary, issues were fixed in August 1871. The first issue—whether the zemindary was partible and liable to all the incidents of property among Hindus—was tried and decided separately on the 24th August, it being founded that the zemindary was partible. The other issues were subsequently tried and disposed of on the 2nd April 1872, when the final judgment decree was passed. From the judgment it appeared that the Court considered that the finding on the 24th August upon the first issue was an adjudication that each brother was entitled to a moiety of the zemindary subject to such encumbrances as might, on determination of the other issues, be found valid. The plaintiff had died on the 28th March 1872 previous to the final decree. An appeal was preferred by the defendants on the ground that on the death of the plaintiff the suit ought to have been dismissed. *Held*, that the decision of the 24th August must be taken as equivalent to a declaratory decree determining that there was to be a division of the estate into moieties, and making the brothers separate in estate from that date. The principle laid down in the case of APPOVIER *v.* RAMA SUBHA AIYAN, 11 Moore's I. A., 75, held to apply. CHIDAMBARAM CHETTIAR *v.* GOURI NATCHIER 6

5————*Surrender by Hindu Widow to heirs—Reversioners.*] The surrender by a Hindu widow or mother to persons, who at the time are the heirs by Hindu Law of the person from whom she has inherited, vests in those persons the inheritance which they would have taken if she had died at the time of such surrender. SHAMA SOONDUREE *v.* SHURUT CHUNDER DUTT, 8 W. R., 500; and GUNGA PERSHAD KUR *v.* SHUMBHOONATH BURMUN, 22 W. R., 393,

Hindu Law—*continued.*
followed. See RAJBOLLOBH SEN v. OMESH CHUNDRO ROOJ, 3 C. L. R., 384; NUFUR DOSS ROY v. MODU SOONDARI BARMONIA... 551

6. ——————*Widow, Estate of, in property bequeathed or devised by husband—Will—Gift to wife.*] According to Hindu Law, by the will of her husband, a widow takes no more absolute right over the property bequeathed to her than she would take over such property if conferred upon her by gift during the lifetime of her husband. In order that she would take a greater interest than a life estate, either by gift or will from her husband, it is necessary that there should be express words in the document giving a heritable right, or power of alienation. KOONJBEHARI DHUR v. PREM CHAND DUTT ...

7——————*Will, Construction of—Idol, Dedication of property to—Attachment.*] J. D. by her will dedicated certain property to an idol, directing that "the Sarodia Poojah and other ceremonies will be performed as hitherto. After all these acts have been observed from the proceeds of the said property, if there be a surplus in the profits, then the family will be supported therefrom. This property will not be liable for the debts of any person * * * Collecting the proceeds of this property you will deduct therefrom the rent, revenue, etc., and will defray from the aforesaid profits the expenses of the daily worship of the said idol * * * , and if there be a surplus after deducting the said expenses, it will also be disbursed in the manner aforesaid * * * My heirs will have no power of gift or sale over the property; and it will not be attached or sold on account of their debts." The sons of the testatrix were appointed executors. *Held*, reversing the decision of the High Court, that the effect of the will was to charge the property in the hands of the executors with the payment of such sums as might be necessary to defray the expenses which might, from time to time, be incurred in the daily worship of the idol in the manner in which such service was performed at the time of the death of the testatrix, and that after defraying such expenses the surplus belonged to the members of the joint family, and that the interest of the sons therein was liable to be attached in execution. AUSHUTOSH DUTT v. DOORGA CHURN CHATTERJEE ... 296

Hindus, Agreements between. See LANDLORD AND TENANT 492

Hundis. See JURISDICTION 268

Hulwe Caste. See SAGAI MARRIAGE ... 505

Idol. Dedication of property to. See HINDU LAW 296

Impartible Zemindary. See CONSTRUCTION OF SUNNUD 439

Inheritance. See MAHOMEDAN LAW ... 11

Insolvency. See EXECUTION OF DECREE 430

Insolvent Act—(11 *and* 12 *Vic c.* 21) *section* 13—*Protection Order—Presidency Magistrate, Act* (*IV of* 1877), *section* 234—*Maintenance, Arrears of, whether a "debt or liability."*] Under a protection order granted by the Insolvent Court under section 13 of the Insolvent Act (11 and 12 Vic. c. 21), an insolvent is protected from arrest or imprisonment in respect of arrears due for maintenance ordered by a Presidency Magistrate under section 234 of Act IV of 1877, when such arrears have been included in his schedule. *Quære.*—Whether the protection applies to arrears of maintenance accruing due subsequently to the making of the schedule. TOKEE BIBEE v. ABDOOL KHAN 458

Interrogatories, Application to strike out—*Practice—Civil Procedure Code*, (*Act X of* 1877), *sections* 121, 125, 127 *and* 136—*Rules of Court.*] If interrogatories administered in a suit are scandalous, the Court may interfere by striking them out at any stage of the suit. In other cases, where the party interrogated objects to the interrogatories administered, he may omit to answer them at his peril, and in that case it is open to the opposite party to apply to the Court under section 127 for an order requiring him to answer the interrogatories either by affidavit, or by *viva voce* examination as the Court may direct. Where the questions are such as need not be answered under section 125, the party to whom they are administered may file an affidavit objecting to answer them. In granting leave to a party to interrogate the opposite party, the Court has only to determine whether the case is a proper case for interrogatories and not what questions the party interrogated may be compelled to answer. SHAMKISHORE MUNDLE v. SHOSHEEBHOOSUN BISWAS 509

Interrogatories—*Cross-Interrogatories.*] WILSON, *J.*:—Where interrogatories have been administered for the examination of a witness by one party, and the other party delivers cross-interrogatories, the latter must, if he objects to any of the other party's questions, make his objections on the face of his cross-interrogatories, and such objections shall be argued at the hearing. GOBIND CHUNDER ROY v. SIB NATH SHAW 171

Investigation. Conditions precedent to. See ACT IV OF 1875, SECTIONS 5 AND 14 331

——————of charges under section 5 of Act IV of 1875. See ACT IV OF 1875, SECTIONS, 3, 4 AND 5 307

Island. See CHUR LAND 154

Joinder of Causes of Action. See EXECUTION OF DECREE, QUESTION RELATING TO 4

Joinder of Causes of Action. See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 44, RULE A 487

Joint Debt—*Execution of Decree against joint family property.*] In a suit against the grandmother and mother of A. and B. as their guardians, to recover rent due from the family, which was joint, in respect of a certain mouzah, which had been held by the father and grandfather of the infants, a decree for Rs. 8,000 was obtained on the 22nd March 1862, but it was ordered that "this decree will not be executed against the person and self-acquired property of the debtors, but against the property left by the two deceased leaseholders." On the 9th April 1862 a second decree was obtained by the same plaintiff against A as heir of his grandfather, and it was ordered that it should be executed only against the property left by the latter; and on the 16th April 1862 a third against his guardian, a similar direction as to execution being made. In execution of the three decrees the plaintiff in the suits had the mouzah put for sale, and at the sale purchased it himself for Rs. 35,000. A. and B. subsequently sold to the plaintiff in this suit their right to recover the sum which the mouzah was charged with in respect of the last two decrees. *Held*, that the mouzah had been properly sold in execution of all three decrees. BISSESSUR LALL SAHOO *v.* LUCHMESSUR SINGH 477

Joint Hindu Family (Mitakshara)—*Execution of decree, Sale in—Purchaser, bond fide without notice, at Sale in execution of decree.*] Although a purchaser at an execution sale can ordinarily get no greater rights than the rights of the person named as the debtor in the decree under which the sale is held, the effect of a sale in execution of a decree against a member of a joint Hindu family under Mitakshara law has been extended on the ground that members of such a family, other than the judgment-debtor, contesting a sale under a decree, when shown to be bound to pay the debt for the realization of which the sale has been brought about, are in equity not entitled to relief against a *bond fide* purchaser without notice. Where the property of a joint family is sold in execution of a decree against one of the members, a judgment-creditor, who was plaintiff, and at whose instance the sale in execution was held, cannot claim to be in the position of a third person purchasing *bond fide* without notice. GRIDHARI LALL *v.* KANTO LALL, and MUDDUN THAKOOR *v.* KANTO LALL, L. R., 1 I. A., 321; DEENDYAL LALL *v.* JUGDEEP NARAIN, 1 C. L. R., 49, and L. R., 4 I. A., 247; and RAM SAHAI *v.* SHEO PROSAD SINGH, 4 C. L. R., 226, discussed. GONESH PANDEY *v.* DABEE DOYAL SINGH... 36

——————————— See MITAKSHARA 26

Joint Family Property—*Suit to recover immoveable property sold in execution for debt of one member of joint family—Lien, Declaration of, in favour of defendant not enforceable as a decree—Equity.*] In a suit by certain members of a joint Hindu family to recover from the auction-purchaser certain immoveable property which had been sold in execution of a decree against one member of the family, a decree was obtained for possession subject to a lien in favour of the defendant for the repayment of the debt for which the original decree had been made, with interest at 6 per cent. up to date of realization. *Held*, that the condition in favour of the defendant was not a decree, and could not be treated as such so as to be capable of being put in execution. SADABURT PERSHAD SINGH *v.* FOOLBAS KOOER, 3 B. L. R., (F.B.) 31, cited. RAMANAGRA SINGH *v.* RAMYAD SINGH ... 176

Joint Trial. See CRIMINAL PROCEDURE CODE (ACT X OF 1872) SECTION 456 574

Judgment-Debtor, Purchase for. See EVIDENCE 470

Judicial Separation, Petition for—*Costs of wife—Succession Act, X of* 1865, *section* 4—*Divorce Act* (*IV of* 1869), *section* 7.] The foundation of the practice of the Ecclesiastical Courts, requiring the husband, in a suit for judicial separation, to give security for his wife's costs, having been displaced by section 4 of the Indian Succession Act, in respect of persons subject to that Act, that practice ought not to be followed except under special circumstances. PROBY *v.* PROBY 1

Jurisdiction. See APPEAL 513

——————— *Cause of action partly outside jurisdiction—Hundis*] The defendant who resided in the district of M, but carried on business through an agent at Calcutta, by a letter dated 4th August 1874, signed by such agent, authorized the plaintiff to advance money to H. K., at M, on hundis drawn there by him upon defendant's firm at Calcutta, the hundis to be accepted and paid at maturity at Calcutta. Hundis were so drawn and accepted, but the money advanced was not paid at maturity. In a suit at M against the defendant as drawer or acceptor, it was *held* that the Court at M had no jurisdiction to try the case. *Per* BROUGHTON, *J.*—If the letter of 4th August 1874 amounted to a request to the plaintiff in M to pay money at M to be re-paid at Calcutta, no cause of action, upon which a suit would lie against the defendant in the district of M, could arise upon it. JUMOONAH PERSHAD *v.* ZAIBUNNISSA 268

——————————See ACT IV OF 1875, SECTIONS 3, 4 AND 5 307

——————————See SONTHAL PERGUNNAHS, SUITS RELATING TO LANDS IN 128

Landlord and Tenant—*Hindus, Agreements between—Buildings erected by tenants—Con-*

Landlord and Tenant—*continued.*
tract Act (*IX of* 1872), *section* 1—21 *Geo. III., c.* 70, *section* 17.] A tenancy in Calcutta created by express contract is within the words "matters of contract and dealing between party and party" within the *proviso* contained in section 17 of 21 Geo. III., c. 70, and, therefore, the rights of the parties in respect of such a tenancy are governed by Hindu Law. RUSSICK LOLL MUDDUCK *v.* LOKENATH KURMOKAR. 492

Leases whether for life or in perpetuity. See REGULATION XLIV OF 1793, LEASES GRANTED DURING EXISTENCE OF ... 138

Liabilities of Ship-owners for goods after being landed. See CARRIERS BY SEA 157

Lien, Declaration of, in favour of Defendant not enforceable as a decree. See JOINT FAMILY PROPERTY 176

Life Tenant, Alienation by. See SUIT BY REVERSIONER 49

Limitation—*Act IX of* 1871, *Schd. II*; *Art* 44—*Act XV of* 1877, *Sched. II. Art.* 45—*Regulation VII of* 1822, *Order under—Possession and declaration of title, Suit for.*] An order of the Board of Revenue under Regulation VII of 1822, declaring a particular person entitled to a settlement of certain lands, is no ground for declaring a third person who was no party to those settlement of proceedings in any stage, debarred under Art. 44, Sched. II of Act (IX of 1871, corresponding with Art. 45, Sched. II of Act XV of 1877), from bringing a suit to establish his title in and to recover possession of the lands after three years and within the general law of limitation. KANTO PROSAD HAZARI *v.* ASAD ALI KHAN 452

2.———*Act XV of* 1877, *Sched. II, Arts.* 139, 142 *and* 144—*Discontinuance of possession—Adverse possession.*] Where there has been possession followed by discontinuance of possession, limitation runs from the moment of its discontinuance whether there has or has not been any adverse possession, and without regard to the intention with which, or the circumstances under which, possession was discontinued. A, the owner of a house, without taking any acknowledgment of his title, allowed B, and after him his representatives, to remain in exclusive occupation of the house for upwards of 30 years free from rent, and after that time brought a suit for ejectment. A retained the title deeds in his possession and paid the rates and taxes. *Held*, that although in England the relation of the parties might be that of a tenancy-at-will, it was not that of landlord and tenant within the meaning of Article 139 of the Limitation Act, XV of 1877, Schedule II. GOVIND LOLL SEAL *v.* DEBENDRO NATH MULLICK 527

Limitation—*continued.*
3.———*Execution of decree, Proceedings in aid of—Limitation Act, XV of* 1877, *Sched. II, Art.* 179, *Cl.* 4.] On the 16th January 1875 a decree-holder applied for execution of his decree, and the 3rd of March 1875 was fixed for the sale of the judgment-debtor's property. On the last-mentioned date the debtor applied for two months time, and the decree holder assented to postponement for that length of time only. The application was granted, and the Court thereupon struck the case off the file. Nothing further was done until the 25th February 1878, when the decree-holder again applied for execution. *Held*, that the application of 3rd March 1875 was in fact a step taken in aid of execution of the decree, and that the application of 25th February 1878 was, therefore, under Act XV of 1877, Sched. II, Art. 179, clause 4, within time. RAJLUKY DASSEE *v.* RAM MUNJURY CHOWDHRAIN 515

4.———*Symbolical possession—Civil Procedure Code (Act X of* 1877), *section* 294.] Where a plaintiff has obtained a decree for possession of immoveable property which is in the occupation of ryots, and in execution thereof has been put in symbolical possession in the manner prescribed by section 294 of the Code of Civil Procedure, he is entitled to maintain a suit against the defendant for the recovery of the same land within 12 years from the date of such symbolical possession. JOGGOBUNDHU MOOKERJEE *v.* RAM CHUNDER BYSACK ... 548

——— See EXECUTION OF DECREE, QUESTION RELATING TO 45

——— See SUIT FOR RENT 63

Limitation Act (IX of 1871), Schedule II. Articles 15, 92 and 45. See MINORS 374

——— **XV of 1877, Schedule II., Art. 85**—*Mutual Accounts.*] A mutual, open and current account, which was kept according to the Sumbut year, having been adjusted in Assin Sudi 1931 S., corresponding with October, 25th, 1874, the date of the last admitted item, a suit was subsequently, on the 6th December 1877, filed for the balance due upon such adjustment. *Held* that, even assuming that on the date of adjustment the account ceased to be mutual, open and current, Art. 85 of Schedule II. of the Limitation Act (XV of 1877) was applicable, and that accordingly limitation ran from the close of the year 1931 S., *i.e.*, the 20th April 1875. GONESH LALL *v.* [illegible] GOLAM SINGH... ... ... [illegible]

——— **XV of 1877, Sched. II. Arts. 89, 90, 120 and 144.** See [illegible] MARRIAGE ... ...

——— **XV of 1877, Sch. II. Art. 171.** See ABATEMENT OF SUIT ON [illegible] OF SOLE PLAINTIFF AFTER DECREE

Limitation Act—*continued.*
——— ——— **XV of 1877, Schd. II., Art. 179 (4).** See CIVIL PROCEDURE CODE (ACT X OF 1877) SECTION 232 253
——— ——— **XV of 1877, Schd. II, Art. 179, cl. 4.** See LIMITATION 513
——— ——— **IX of 1871, section 3.**—*Majority—Domicile.*] For the purposes of the Limitation Act, IX of 1871, no person, whatever his domicile may be, is protected from the operation of the Act beyond the age of 18, and the three years of grace given by that Act. I. R. RAINEY *v.* NOBO COOMAR MOOKERJEE ... 543
——— ——— **IX of 1871, Sch. VI, Art. 110.** See SUIT FOR RENT 62
Loss by fire. See CARRIERS BY SEA ... 157

Mahomedan Law—*Inheritance—Slavery, Status of—Emancipated Slave, Inheritance from—Wula Law—Act V of* 1843, *sections* 2 *and* 3.] A female slave had a child by her master, a Mahomedan, who afterwards emancipated and married her. *Held*, that under section 3 of Act V of 1843 her heirs were entitled in preference to the heirs of her emancipator, to succeed to the share of her husband's estate, to which she had, upon his death in 1842, succeeded as his widow, the Wula rule of Mahomedan Law notwithstanding. It was the general intention of the Legislature, in passing Act V of 1843 as evidenced by sections 2 and 3, to relieve all persons then subject thereto from all disabilities arising out of the status of slavery. The words "who may have acquired property by inheritance" in section 3 must be taken to include any person who would have acquired a title to property by right of inheritance, but for some obstacle arising out of the status of slavery. The words "the person from whom the property may be derived was a slave" apply to any person who has at any time been a slave. SAYAD MIR UJMUDIN KHAN *v.* ZIA-UL-NISSA BEGUM ... 11

2. ——— ——— *Pre-emption — Talaba-ish-tikad.*] It is sufficient to establish the right of pre-emption that the ceremony of *Talaba-ish-tikad* be performed before witnesses in the presence of the purchaser upon the lands which are the subject of the claim although he be not in possession. JEHANGIR MAHOMED *v.* MAHOMED AJJAD 370

——— ——— ——— **of Gift**—*Death illness, Gift made during—Murg-ul-mout—Possession of Donee.*] Where property, the subject-matter of a gift made by a Mahomedan during his death illness (*murg-ul-mout*), was in the hands of the donee as manager or agent of the donor, it was *held* that the possession of the donee as such manager or agent was not such possession as would render it unnecessary to the validity of the gift that there should have been an actual or formal delivery to him of possession of the property. VALAYET HOSSEIN *v.* MANIRAN 91

Maintenance, Arrears of, whether a "Debt or Liability." See INSOLVENT ACT, SECTION 13... 458
——— ——— **Re-adjustment of.** See MAINTENANCE, SUIT FOR, BY HINDU WIDOW 18
——— ——— **Suit for, by Hindu Widow**—*Re-adjustment of Maintenance.*] A suit brought by a widow, against the adopted son of her husband, for possession of her husband's estates, was compromised in the terms of a solenamah under which the defendant agreed to pay to the plaintiff a certain sum for maintenance, the same to be secured by assignment of the rents payable by certain ryots. Subsequently, the holding, the rents of which were assigned, having become unfit for cultivation by reason of an inundation of salt water, and the defendant himself having become greatly impoverished by his estate having been injured by the same cause, the amount due for maintenance was not paid, and the widow brought a suit to recover that amount. *Held* that, inasmuch as the amount of maintenance must be taken to have been fixed with reference to the extent and value of the property, the Court had power to re-consider the allowance and to re-adjust it to the altered circumstances. RAJENDER NATH ROY *v.* S. M. RANEE PUTTO SOONDERY DASSEE 18
——— ———, **Stay of order for.** See PRESIDENCY MAGISTRATES ACT (IV OF 1877) SECTIONS 234 AND 235, POWERS OF MAGISTRATES UNDER 21
Majority. See LIMITATION ACT (IX OF 1871) SECTION 3 543
Marriage. Evidence of. See ADULTERY 597
Mark of witness to will. See SUCCESSION ACT (X OF 1865) SECTION 50 565
Measurement of Lands. See ACT VIII (B.C.) OF 1869, SECTION 37 139
Mesne Profits from time of execution stayed. See STAY OF PROCEEDINGS PENDING APPEAL SUBSEQUENTLY DISMISSED . 189
——— ——— **Pro-forma defendant not liable for.** See EXECUTION OF DECREE 305
Minor—*Certificate to collect debts—Act XXVII of* 1860.] SEMBLE.—A certificate to collect debts under Act XXVII of 1860 may be granted to a minor by his next friend. KALI COOMAR CHATTERJEA *v.* TARA PROSUNNO MOOKERJEE 517
Minors—*Act XL of* 1858, *section* 18. *Effect of sanction under—Onus of proof—Suit to recover property sold by Guardian with sanction of District Judge under Act XL of* 1858, *section* 18—*Limitation Act, IX of* 1871, *Sched. II, Arts.* 15, 92 *and* 145—*Registration, Whether Limitation runs from date of.*] Where the plaintiff sued to recover possession of certain

Minors—*continued.*
properties which had been sold, with the sanction of the District Judge under section 18 of Act XL of 1858 for the payment of debts, during his minority by his guardians, *held*, that although the plaint asked that the deeds of sale might be set aside, the primary object of the suit was the recovery of the property, the validity or invalidity of the sales forming only one of the questions involved in that claim, and that, therefore, the period of limitation prescribed was that provided by section 145 and not section 92 of the Limitation Act (IX of 1871.) BENNETT *v.* HAMILL, 2 Sch. and Lef., 576. The sanction accorded under section 18 of Act XL of 1858 by a District Judge to an alienation of a minor's property, is not an order of the nature contemplated by Art. 15, Sch. II of Act IX of 1871. *Per* GARTH, *C.J.* (following the principle laid down in BENNETT *v.* HAMILL, 2 Sch. and Lef. 576; and BOWEN *v.* EVANS, 1 Jones and La Touche, 178):—A purchaser, who has purchased in good faith under an order for sale of a District Judge made under section 18 of Act XL of 1858, acquires a good title, unless the minor or those claiming under him can show, at some future time, that the sale was fraudulent or improper, and that the debt which formed the consideration of the sale was one for which he was not responsible. *Per* PRINSEP, *J.*—The only effect of the sanction of the District Judge is to throw the *onus* on the plaintiff to show that the alienations were improperly made, but where the purchasers are the creditors, whose debts were satisfied by such alienations, the burden of proof is shifted on to their shoulders as soon as the plaintiff has established a *primâ facie* case. Strangers purchasing under such a sanction would be entitled to every protection so long as it was not shown that they had acted in a fraudulent or collusive manner, knowing that the debts, for the liquidation of which the purchase-money would be applied, were not binding upon the minor * * * * The entire case upon which an alienation of property belonging to a minor was sanctioned by a District Court can, in a regular suit, be considered, if the minor on attaining his majority thinks that such alienation has been wrongly permitted, and that he was not liable to satisfy the particular debts which the District Judge, in an *ex-parte* case held, was binding on the estate. RAJAH LALL *v.* DELPUTTI SINGH 374

2. ———*Succession Act, section* 261—*Act XL of* 1858, *section* 3—*Permission of Court to represent minor—Civil Procedure Code, Act X of* 1877, *sections* 440 *and* 462.] A. applied for revocation of probate granted to J. who styled himself as "father and guardian of B., minor," but it did not appear that A had obtained a certificate under section 3 of Act XL of 1858, or had the permission of the Court to represent

Minors—*continued.*
the minor. The petition was dismissed, but on A.'s death, an appeal was preferred by the minor, through his natural guardian. *Held*, that the appeal could not proceed, inasmuch as the minor was not a party to the proceedings in the Court below. The permission of the Court to institute proceedings on behalf of a minor, being an act of judicial discretion open to appeal, must be formally recorded. MRINAMOYI DABIA *v.* JOGODESHURI DABIA 361

Misdirection—*Appeal, Grounds of second.*] The fact that the lower Appellate Court has misdirected itself as to the effect of evidence which has been admitted in a suit, is an error of law affording a good ground for a second appeal. RAM PROSAD DASS *v.* RAJO KOER 94

Mitakshara Joint Estate—*Alienations by father of joint family—Alienee, Rights of.*] An alienation of joint family property made by a father under the Mitakshara law, for the purpose of paying off an antecedent debt, is binding upon the sons, unless they show that the debt was contracted for immoral purposes. The case of BHEKNABAIN SINGH *v.* JANUK SINGH, I. L. R., 2 Cal., 438, being opposed to the decision of the Privy Council in the case of GRIDHARI LALL *v.* KANTOO LALL, L. R., 1 I. A., 321. as explained by that of RAM SAHAI *v.* SHEO PROSAD SINGH, 4 C. L. R, 226, and L. R. 6, I. A, cannot now be followed. GUNGA PERSHAD *v.* SHEODYAL SINGH 224

2. ——————*Sale in execution of decree against member of joint family—Purchaser, Right of—Gift of joint property by one of two members of joint family to the other—Act XL of* 1858, *section* 12—*Suit by Collector on behalf of infant.*] Certain joint property held under Mitakshara law by A and his infant son B was attached and sold in execution of a decree against A for his own personal debts. Between the date of the attachment and the sale, A made over all his property to B by deed of gift. The District Judge thereupon directed the Collector to take possession on behalf of the infant, under Act XL of 1858, section 12. The Collector accordingly did so, but subsequently he had to bring a suit, in A's lifetime, against the execution-creditor who had taken possession under the decree, to set aside the auction sale. *Held*, that inasmuch as by reason of the deed of gift the property which the Collector was directed to take charge of, and administer was not the interest of a member of joint Mi[tak]shara family—the Collector might on be[half] of the infant institute such a suit. *Held* fur[ther] on the authority of the case of DEENDYAL L[AL] *v.* JUGDEEP NARAIN SINGH, 1 C. L. R., [4]5 R., 4 I. A., 247, that all that passed under execution sale was the right and interest in the disputed property, and that it was necessary to enquire whether the debts for

Mitakshara Joint Estate—*continued.*
the decree was obtained were binding upon the son or not. *Held*, also, that the rights of all parties might be determined in the present suit upon the plaintiff's mother being added a party. SUMRUN THAKOOR *v.* CHUNDERMUN MISSER, 5 C. L. R., 26, followed. RUDEE PERKASH MISSER *v.* HURDAI NARAIN SAHU ... 112

Mitakshara Joint Family. See HINDU LAW 576

Mitakshara Joint Hindu Family—*Suit to set aside sale in execution of decree obtained against a member of joint family—Auction-purchaser. Right of, to insist upon partition of joint estate.*] In a suit by a member of a joint Mitakshara family, against an auction purchaser of the rights and interests of such of the members of the family who had executed a mortgage bond as security for a loan, the auction-purchaser is entitled, as defendant, to insist upon a right to have the joint property partitioned as against the plaintiff, and to have apportioned to him the shares of the judgment-debtors. DEENDYAL LALL *v.* JUGDEEP NARAIN SINGH, 1 C. L. R., 49, and L. R., 4 I. A., 247, commented upon. SUMRUN THAKOOR *v.* CHUNDERMUN MISSER ... 26

——— See JOINT HINDU FAMILY 36

"Mocurrari Ijarah." See REGULATION XLIV OF 1793, LEASES GRANTED DURING EXISTENCE OF 138

Mohunt, Appointment of. See MUTH, SUCCESSION TO MOUROSI 73

Mohunts, Disqualification of, how determined. See MUTH, SUCCESSION TO MOUROSI 73

Money paid in execution of Decree, Suit to recover—*Decree superseded.*] A decree which contained the condition that the rent of the year 1279, in excess of the ordinary rent, should be allowed only in the event of the Appellate Court affirming a previous decree allowing a similar sum in excess, as enhanced rent for the year 1278, was allowed to be executed in respect of the enhanced rent before the Appellate Court had given its decision, no objection having been made by the judgment-debtors. The Appellate Court having subsequently disallowed the enhanced rent claimed for the year 1278, it was held that the judgment-debtors were entitled to recover the amount paid by way of enhanced rent for 1279. SHAMA PERSHAD ROY CHOWDHRY *v.* HURO PERSHAD ROY CHOWDHRY, 3 W. R., P. C., 11; and JOGESH CHUNDER DUTT *v.* KALI CHURN DUTT, I. L. R., 3 Cal. (F.B.) 30, cited. ELLAHEE BUX CHOWDHRY *v.* KALY MOHUN MOOKHOPADHYA 519

Mortgage—*Mortgagee in possession, Effect of purchase of Birt tenures by—Birt tenures*

Mortgage—*continued.*
—Redemption—Encumbrances, Purchase of, by mortgagee.] An Oudh taluqdar, who had mortgaged a portion of his taluq to the defendant, under a deed transferring the whole taluqdari interest in such portion until redemption to the mortgagee, is entitled in a suit for redemption, on repayment of the mortgage loan, not only to redeem the superior rights of taluqdar which he was possessed of at the time of the execution of the mortgage, but also to be put into possession of subordinate rights and tenures purchased and treated as merged, by the mortgagee while in possession from *birtias*, or inferior zemindars, holding under the taluqdar within the mortgaged portion of the taluq. The nature of *birt* tenures discussed. KISHEN DUTT RAJAH *v.* MUMTAZ ALI KHAN 213

2. ——— *Mortgaged property, Purchase of, by first mortgagee—Priority.*] If the first mortgagee purchases the property mortgaged after a second mortgage is created upon it, he does not thereby lose the benefit of his first mortgage if the money due under the first mortgage be set off against the consideration of the sale. Accordingly, where a second mortgagee obtained a decree upon his mortgage subsequently to a sale of the mortgaged property to the first mortgagee, who had been allowed to set off the money due to him on his mortgage against the consideration, the latter is entitled as against the auction-purchaser at the sale in execution of the decree to priority in regard to his mortgage. BISSEN DOSS SINGH *v.* SHEO PROSAD SINGH ... 29

3. ——— *Possession, Suit for, by purchaser at Sale in execution of decree on a mortgage against holder of Mocurrari of subsequent.*] At a sale in 1871, in execution of a decree upon a mortgage, dated 3rd May 1867, A purchased the mortgaged lands, the existence of a mocurrari granted in 1868, having been notified at the sale. *Held*, that a suit by A against the mocurraridars for possession would not lie, the existence of the mortgage being no bar to the creation of a subsequent incumbrance carrying with it the right of possession. SYAD EMAM MOMTAZUDDEEN *v.* RAJ COOMAR DAS, 23 W. R., (F. B.) 187; GOPEE BUNDHOO SHANTRA MOHAPATTER *v.* KALEE PUDO BANNERJEE, 23 W. R., (F. B.) 187; SAWRUTH SINGH *v.* BHEENUCK SAHOO, 12 W. R., 522; SARAWAN HOSSEIN *v.* SHAHAZADAH GOLAM MAHOMED, 9 W. R., (F. B.) 171; GOPEE NATH SINGH *v.* SHEO SAHOY SINGH, 1 W. R., (F. B.), 315, discussed. KOKIL SINGH *v.* DULI CHUND... 243

4. ——— *Resumption by Government of portion of lands mortgaged, and subsequent sale to mortgagor—Equity—Waiver.*] Government having, under the Land Acquisition Act, taken possession of portion of certain land which had been mortgaged by the owner, subsequently, while the mortgage was still in force, resold the portion

Mortgage—*continued.*
taken, to the mortgagor, who sold it to a third person *bonâ fide* for value. In a suit by the mortgagee, (who had taken no steps to obtain any portion of the money paid by the Government for the land,) praying for the sale under the mortgage of the land resumed by Government, *Held*, that the plaintiff as mortgagee had waived his rights under the mortgage, and that the purchaser from the mortgagor had acquired a title free from the plaintiff's incumbrance. *Quære*:—Whether the mortgage claim might not, but for the waiver, have reattached, on the lands resumed by the Government again coming into the possession of the mortgagor. RAM AWTAR SINGH *v.* TULSI RAM 227

——— **Suit.** See HINDU LAW ... 576

——— **Foreclosure of.** See REGULATION XVII OF 1606, SECTION 6... ... 599

——— **of Government Security.** See PUBLIC DEBT OFFICE 586

——— **of joint property by father** See HINDU LAW 576

Mortgagee in possession, Effect of purchase of Bir Tenures by. See MORTGAGE 213

Mortgaged Property, Purchase of, by first Mortgagee. See MORTGAGE ... 29

Muth, Succession to Mourosi—*Mohunt Appointment of—Bandhara ceremony—Revocation of nomination of chela as Mohunt—Customs of Muths—Disqualification of Mohunts, how determined.*] In the case of a *mourosi* Muth the investiture by the leading neighbouring Mohunts at the Bandhara ceremony, of one who cannot prove that he was actually appointed by the last Mohunt, is not sufficient, in the absence of proof that he has a right to be so appointed as being senior chela of the last Mohunt, to entitle him to succeed to the Guddee. The succession to Muths or religious endowments must be regulated in each case by the nature of the endowment, and the rule of succession prescribed by the founder of the institution; and if this rule cannot be discovered from the original deed of gift or other documentary evidence, it must be proved in each case by showing what the usage has been on the occasion of each succession. A Mohunt of a *mourosi* Muth, by a deed of gift in 1849, made over all the property of the Muth to his senior chela and invested him with the Chudder of Mohunti; but subsequently a dispute having arisen on account of the immoral life led by appointee, a compromise was effected by which the former Mohunt was permitted to take back the Muth, and the property belonging to it, the other being allowed merely to retain possession of a subordinate Muth. In 1873 the Mohunt died, leaving a will, dated 6th May 1873, by which he appointed the defendant his successor. The original appointee thereupon obtained his

Muth, Succession to Mourosi—*continued.*
own confirmation as Mohunt, at a Bandhara ceremony, by the neighbouring Mohunts, and brought a suit against the defendant who was in possession for recovery of possession of the Muth and the properties belonging thereto, relying on the deed of gift of 1849. *Held*, that the Muth being mourosi, the plaintiff was not entitled to possession, there being no reason why the deed of gift should not be considered to have been cancelled by the compromise or by the will. Questions as to whether a claimant to a Muth is a Sunjogi, or whether from his conduct and mode of life he is disqualified for the office, may be determined by a Civil Court. SITA PERSHAD *v.* THAKUR DASS 73

"Murg-ul-mout." See MAHOMEDAN LAW GIFT 91

Mutual Accounts. See LIMITATION ACT (XV OF 1877), SCHEDULE II, ART. 85... 211

Negotiable Instrument. See PUBLIC DEBT OFFICE 586

Notice of intended Measurement. See ACT VIII (B.C.) OF 1869, SECTION 37... 132

Notice to quit—*Ejectment Suit.*] A notice to quit within thirty days, served by a landlord on his tenant, at a time when the crops are ripening, is unreasonable and insufficient. Where such a notice was given, the Court refused to determine what would have been a sufficient notice, and to make a decree to take effect at a future date on the basis of such notice. *Per* GARTH, *C.J.*:—The cases of MAHOMED RASID KHAN CHOWDHRY *v.* JADOO MIRDA, 20 W. R., 401, and HEM CHUNDER GHOSE *v.* RADHA PERSHAD PALLEET, 23 W. R., 440, considered and doubted. JUBRAJ ROY *v.* W. MACKENZIE 231

Obstruction to Tidal Stream. See RIPARIAN OWNERSHIP 97

Onus of proof. See MINORS 374

Parties—*Benamidar, Suit in sole name of.*] Where a suit is brought in the name of a benamidar only, the Court ought to direct that the beneficial owners should be made parties, and not to dismiss the suit. SITA NATH SHAHA *v.* NOBIN CHUNDER ROY 102

———. See HINDU LAW 376

———. See ENHANCEMENT OF RENT ... 545

———. See CHUR LAND... 154

———. See REGISTRATION ACT (III OF 1877) SECTIONS 34, 35, 73, 74, 76, AND 77 ... 172

Partition—*Butwara, Evidence of—Regulation XIX of 1814—Division, Mode of.*] Proceedings for partition having been instituted under Regulation XIX of 1814, it was proposed, in order to make equality of partition, that three villages

Partition—*continued.*
should be divided in unequal proportions, and a *goshwara* was accordingly prepared by the Ameen, setting out in one column the extent of the shares to be allotted, and in another the assessed jumma of each share allotted. In a suit in 1873 by the representatives of one of the shareholders to recover portions of the three villages, the only evidence that the partition had been completed was an *istahar* of the Deputy Collector, dated October 1864, directing the Nazir to require the ryots to pay their rents according to the extent of the shares as set forth in the first-mentioned column of the *goshwara;* that is, according to the quantity instead of according to the quality and value which were the basis of the partition. *Held*, (affirming the judgment of the High Court), that the plaintiff, having failed to prove any order for partition drawn out, under section 13 of the Regulation, by the Collector, was not entitled to recover according to the quantity of the land, but if at all, according to its value as ascertained in the column of the *goshwara* in which the assessed jumma was set forth. HURRO SUNDARI DEBIA *v.* KESUB CHUNDER ACHARJYA 257

——— See ARBITRATION AWARD ... 338

——— See CONSTRUCTION OF SUNNUD 439

——— **Suit for.** See HINDU LAW ... 6

Penal Code, Act XLV of 1860, section 497. See ADULTERY 597

Pending Suit. See CIVIL PROCEDURE CODE (ACT X OF 1879), SECTION 372... ... 569

Permanent Settlement, Enhancement of Lands not subject of. See ENHANCEMENT OF RENT OF TENURE ON GROUND OF AREA BEING INCREASED BY ALLUVION... 33

Permission of Court to represent Minor. See MINORS 361

Perpetuities. See WILL, CONSTRUCTION OF 496

Plaint, Amendment of—*Variance between case in plaint and evidence—Civil Procedure Code (Act X of 1877), section 53.*] In a suit to recover the balance of an account which the plaintiff in his plaint alleged to be due from the defendant for the hiring of certain boats, the defendant denied that the boats had been hired by him, stating that he had been employed by the plaintiff merely as an agent to find hirers. Upon the evidence, it was found that the defendant's version was correct. *Held*, that the plaintiff was not entitled to an account and discovery from the defendant as his agent, such relief not having been asked for in his plaint. *Held*, also, that the plaintiff could not be allowed to amend his plaint by adding an alternative prayer in order to meet the view of the case appearing on the evidence. SHIBKRISTO SIRCAR *v.* ABDOOL HAKEEM 455

Possession and declaration of Title, Suit for. See LIMITATION 452

———, **Discontinuance of.** See LIMITATION 527

——— **of Donee.** See MAHOMEDAN LAW GIFT 91

———, **Presumption of, from evidence of title.** See TITLE 481

——— **through Ticcadars.** See CRIMINAL PROCEDURE CODE (ACT X OF 1872), SECTION 530 287

———, **Suit for, by purchaser at sale in execution of decree in a mortgage against holder of Mocurrari of subsequent date.** See MORTGAGE ... 243

———, **Suit for**—*Title, Primâ facie evidence of—Possessory Suits—Evidence Act, section 110—Specific Relief Act, I of 1877, section 9.*] In a suit for possession, where the plaintiff proved that he had been in possession of the lands in dispute, that he had been ousted by the defendants, who were unable to give any proof of their right so to oust him, or of a superior title, *held* (PRINSEP, *J.*, dissentiente) that the prior possession of the plaintiff was *primâ facie* evidence of title, and that he was entitled to a decree. *Per* PRINSEP, *J.*:—Proof of prior possession and of illegal dispossession are in themselves no evidence of title except in a possessory suit under the Specific Relief Act, (I of 1877). * * * Section 110 of the Evidence Act applies only to actual and present possession, and does not declare generally that possession shall always be *primâ facie* evidence of title. KAWA MANJI *v.* KHOWAZ NUSSIO 278

———, **Symbolical.** See LIMITATION 548

Possessory Suits. See POSSESSION, SUIT FOR 278

Pottah within meaning of Madras Act VIII of 1865. See REGISTRATION ... 341

Practice. See ADMINISTRATION 368

———. See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 372 569

———. See INTERROGATORIES, APPLICATION TO STRIKE OUT 509

——— **of High Court.** See BOND IN NAME OF JUDGE TO SECURE COSTS 524

——— ———. See CIVIL PROCEDURE CODE, SECTION 375 464

Pre-emption. See MAHOMEDAN LAW ... 370

Presidency Magistrates' Act (IV of 1877), section 234. See INSOLVENT ACT, SECTION 13... 458

——— **sections 234, 235, Powers of Magistrates under**—*Maintenance, Stay of Order for—Divorce under Mahomedan Law, Effect of.*] A Presidency Magistrate is competent to stay the operation of an

Presidency Magistrates' Act—*continued.*
order made under section 234 of Act IV of 1877, for maintenance of a wife, and to refuse to issue his warrant under the 3rd clause of that section, although he cannot formally cancel the order which must be taken to have been a proper and legal order when it was made; and he is competent to try all questions which affect the rights of a woman to receive maintenance. For the purposes of Chapter XVIII of Act IV of 1877, a Magistrate must, when a question of divorce arises, determine on such evidence as may be before him, whether there has or has not been a legally valid divorce. ABDUR RAHMAN *v.* SAKINA 21

Presumption. See EVIDENCE ACT, (I OF 1872), SECTION 90 135

——— as to genuineness of endorsements on stolen note. See PUBLIC DEBT OFFICE 586

Prevailing rate of Rent. See ENHANCEMENT OF RENT 41

Priority. See MORTGAGE... 29

Privilege from arrest—*Small Cause Court, Calcutta, Control of High Court over—Act X of 1877, section 642—High Court's Criminal Procedure Code, Act X of 1875, section 148 (c).*] Where a defendant in a suit in the High Court was arrested in execution of a decree of the Calcutta Court of Small Causes, while attending before an arbitrator appointed by the High Court to take a reference in the suit, it was *held*, that he was privileged from such arrest while so attending, and that the High Court had power to direct his release from custody. Small Cause Courts in the Presidency towns are subject to the order and control of the High Courts. In the matter of OMRITOLALL DEY, I. L. R., 1 Cal., 78, followed. In the matter of JUGGESSUR ROY 170

Procedure. See CRIMINAL PROCEDURE CODE (ACT X OF 1872), SECTION 458... ... 574

——— See ACT VIII (B.C.) of 1869, SECTIONS 38 AND 39 484

Property situated in different districts. See REGULATION XVII OF 1806, SECTION 8 599

Protection Order. See INSOLVENT ACT (11 AND 12 VIC. C. 21)... 458

Public Debt Office—*Bank of Bengal—Mortgage of Government Security—Negotiable Instrument—Title—Presumption as to endorsements on stolen Note.*]—The business of the Public Debt Office is entrusted by the Government of India to the Bank of Bengal, and is transacted by the Bank, separately from their own business as Bankers. A promissory note of Rs. 10,000 was sent to the Public Debt Office from the treasury at Backergunge for enfacement, in order that interest might be obtained upon it at the Backergunge Treasury. Whilst the note was at the Public Debt Office for this purpose, it was stolen from them by one of the Bank Clerks. After this the defendant took a loan from the Bank in their private capacity giving them his promissory note for the amount of the loan and deposited with them three Government notes, one of which was the stolen note for Rs. 10,000. The Bank subsequently sent this note at the request of the defendant to the Public Debt Office for enfacement, and the Public Debt Office detained it, upon the ground that it had been previously stolen from them, whilst in their custody. The Bank thereupon sued the defendant on his promissory note, and he resisted the suit upon the ground that he was not bound to pay the amount till all his securities were returned to him. There were apparent endorsements on the Government note prior to that of the thief, by whom it was endorsed over to B, who sold it to the defendant for full value, but there was no evidence that these were genuine, or that the note had been actually negotiable at the time of the theft. *Held*, that no presumption in favour of negotiability could be made from the apparent endorsements which had not been proved, and that the defendant, therefore, had not established a superior title (of purchaser *bond fide* without notice of the theft for value of a negotiable instrument) to rebut the *primâ facie* title of the Public Debt Office as agents for the Government on behalf of the true owner; and that under the circumstances the Public Debt Office was justified in detaining the note. *Per* PONTIFEX, *J.*—Whether the Public Debt Office was so justified or not, the plaintiffs were entitled to recover the amount of their loan. BANK OF BENGAL *v.* M. A. MENDIES ... 586

Public Document. See ACT IV OF 1875, SECTIONS 5 AND 14 331

Purchaser bona fide without notice at Sale in Execution of Decree. See JOINT HINDU FAMILY (MITAKSHARA) 6

Purchaser, Right of. See MITAKSHARA JOINT ESTATE 112

Ratification. See HINDU LAW 347

Re-adjustment of Maintenance. See MAINTENANCE, SUIT FOR, BY HINDU WIDOW... 18

Recognised Purchaser. See RENT SUIT... 179

Redemption. See MORTGAGE 213

——— by Government of portion of lands mortgaged, and subsequent sale to Mortgagor. See MORTGAGE ... 227

Registration—*Act XX of 1866, section 17—Pottah within meaning of Madras Act VIII of 1865.*] A, having received large advances from B to enable him to carry on a protracted litigation, executed a lease of a village S., of which the annual value was Rs. 1,700, to B, in the

Registration—*continued.*
following terms:—"In consideration of the assistance you have rendered you requested that the village of S should be leased to you for forty years, fixing a favourable rent. The aforesaid village has accordingly been leased to you for forty years at Rs. 400 per annum. You shall therefore raise the required crop and enjoy, and agreeably to the *kararnamah* you have given, you shall continue to pay the fixed rent according to the instalments of kists year by year." The lease was not registered. *Held*, that the lease was not one granted for the purpose of bringing waste lands into cultivation, and therefore not a *pottah* within the meaning of section 3 of Madras Act VIII of 1865, and was, accordingly, void for want of registration under section 17 of Act XX of 1866. RAMASWAMI CHETTI *v.* COLLECTOR OF MADURA 341

———*Bond unregistered, how far admissible in evidence.*] Plaintiff sued upon a document in the nature of a bond, by which the defendant agreed to repay to the former, with interest, a certain loan advanced, it being further provided by the bond that, as collateral security for the loan, certain immoveable property should remain hypothecated. The document was not registered. *Held*, that, although by reason of non-registration, the document would not be operative as regards the hypothecation, it was admissible in evidence to prove that the defendant was liable for the loan advanced under it. LUCHMIPUT SINGH DUGAR *v.* MIRZA KHAIRAT ALI, 4 B. L. R. (F.B.,) 18, followed; SREEMUTTY MATONGINY DOSSEE *v.* RAMNARAIN SADKHAN, 2 C. L. R., 428, distinguished. KISTO LALL GHOSE *v.* BONOMALI RUJ 43

———— **Whether Limitation runs from date of.** See MINORS 374

Registration Act, (III of 1877,) sections 34, 35, 73, 74, 76, 77—*Suit to compel registration—Denial of execution of document—Document, Refusal to attend and admit execution of—Parties.*] A refusal to admit execution of a document presented for registration is a denial of execution, within the meaning of the Registration Act, III of 1877; a wilful refusal or neglect to attend before the Registrar and admit execution in obedience to a summons is a refusal to admit, and therefore a denial. The Registrar is not a necessary party to a suit properly brought under section 77 of the Registration Act. RADHAKISSEN ROWRA DAKNA *v.* CHOONEELALL DUTT ... 172

———— **(VIII of 1871,) sections 49 and 60**—*Document purporting to be registered—Evidence.*] Where a document, which purports to have been registered, is tendered in evidence, the Court cannot reject it for non-compliance with the Registration Law, but it can deal with all other objections brought against it on their merits. SHEO SUNKER SAHOY *v.* HURDEY NARAIN SAHU 194

Regulation XLIV of 1793, Leases granted during existence of—*Regulation VIII of 1819, Leases existing at time of passing of—Leases whether for life or in perpetuity—"Mocurrari ijarah."*] In 1798, lands were granted by the zemindar to R for the purposes of cultivation and improvement under a document described as a "mocurrari ijarah" for a term of four years at Rs. 6 per annum, and then at a uniform rate of Rs. 25 per annum. It was stipulated that the grantee should not dispose of any portion of the lands without the permission of the grantor. Up to 1819, the lease was treated by the parties as a valid existing lease, and it continued to be so treated until the death of R in 1875. *Held*, that the lease must be construed as a lease for the life of R only and not in perpetuity, and that the zemindar was entitled to possession on R's death. The use of the word "*mocurrari*" raises no presumption that the lease was intended to be hereditary, but in order to see whether it was so intended, it is necessary to look to the terms of the instrument itself and the circumstance under which it was made. Regulation XLIV of 1793 was intended to apply to leases which might have been avoided by the grantor or his heirs during the time that Regulation was in force, but which had been acted upon by both parties after the expiration of ten years, and were treated and considered as in existence at the time of the passing of Regulation VIII of 1819. SHEO PERSHAD SINGH *v.* KALLY DASS SINGH 138

———— **VIII of 1819, Leases existing at time of passing of.** See REGULATION XLIV OF 1793, LEASES GRANTED DURING EXISTENCE OF 138

———— **XVII of 1806, section 8**—*Mortgage, Foreclosure of—Property situated in different Districts.*] In foreclosure proceedings where the property mortgaged is situated in different districts, it is sufficient under Regulation XVII of 1806, section 8, for a notice of foreclosure to be issued by the Judge of either district. RASMONI DEBIA *v.* PRAN KISHEN DAS, 4 Moore I. A., 392, followed. PROSUNNO COOMAR ROY CHOWDRY *v.* HARAN CHUNDER CHATTERJEE 599

———— **XIX of 1814.** See PARTITION 257

———— **XI of 1825.** See ENHANCEMENT OF RENT OF TENURE ON GROUND OF AREA BEING INCREASED BY ALLUVION 33

———— **VII of 1822, order under.** See LIMITATION... 452

———— **XI of 1825, section 2.** See ALLUVION 418

Religious Trusts. See WILL, CONSTRUCTION OF 496

Rent Charge. See CONSTRUCTION OF DEED 449

——, **Prevailing rate of.** See ENHANCEMENT OF RENT 41

Rent—*continued.*

—— **Suit**—*Recognised Purchaser—Benami.*] Plaintiff, who derived title from A, who was the ostensible purchaser of certain immoveable property at an auction sale in execution of a decree against B, brought a suit to recover the rent of such property from the taluqdars. The appellant was allowed to intervene, alleging that A was the benamidar of a third person from whom he himself had purchased the property. The lower Court, however, refused to try the question of *benami* as not being admissible in a rent suit. On appeal, *held* that the question of *benami* was properly raised in the suit, and ought to have been tried. RUGHOO NAUTH PERSHAD *v.* BYJNATH SAHOY, 24 W. R., 349, cited and distinguished. TARINI KANT LAHIRI CHOWDHEY *v.* KRISHNA MONI CHOWDHRANI 179

Res Judicata—*Act X of* 1877, *section* 13, *Expl. I,* (*amended by Act XII of* 1879, *section* 6.)] In order to constitute the bar of *res judicata*, it is not sufficient merely that an issue on the same point should have been raised in the former suit, although that issue may have been incidentally decided; but it must appear that the matter referred to was alleged by one party, and either denied or admitted expressly or impliedly by the other. SHAMA CHURN CHATTERJEA *v.* PROSUNNO COOMAR SANTIKAREE ... 251

Retrial. See REVIEW OF JUDGMENT OF COURT OF SMALL CAUSES 559

Reversioner See HINDU LAW 551

Review of Judgment of Court of Small Causes—*Act X of* 1877, *Chapter XLII—Act XI of* 1865—*Retrial.*] In applications for review of judgments of Courts of Small Causes constituted under Act XI of 1865, the procedure laid down in the rules contained in Chapter XLII of the Code of Civil Procedure (Act X of 1877) is to be strictly followed without reference to the procedure relating to new trials under section 21 of Act XI of 1865. ISHAN CHUNDRA BANERJEE *v.* LOCHUN GOPE 559

Reviver. See CIVIL PROCEDURE CODE (ACT X OF 1877) SECTION 372 569

Revocation of nomination of Chela as Mohunt. See MUTH, SUCCESSION TO MOUROSI 73

Right of way. See ARBITRATION AWARD 338

Right to sue for Possession. See SUIT BY REVERSIONER 40

River, Sudden Change of. See ALLUVION 418

Riparian Ownership—*Tidal unnavigable Stream, Proprietorship of—Obstruction to Tidal Stream—Cause of action—Easement.*] The plaintiff, who was the proprietor of lands and premises on one side of a tidal, but unnavigable khal, the proprietorship of

Riparian Ownership—*continued.*

which was vested in the Government, sued the defendant, the proprietor of lands on the other side, to have removed a wall which the latter had constructed, and which encroached upon the stream, on the ground that damage might result to his lands and premises by reason of such encroachment upon the stream. It was not shown that the flow of the stream had been sensibly altered, or that the plaintiff had a right or easement to have the water flow in its accustomed manner. *Held*, reversing the decision of the High Court, that the suit would not lie, the encroachment having been on the soil of the Government without any sensible injury to the plaintiff. BICKETT *v.* MORRIS L. R., 1 H. L., Scotch App., 47, cited and distinguished. KALI KISHEN TAGORE *v.* JADOO LALL MULLICK 97

Rule Nisi. See BOND IN NAME OF JUDGE TO SECURE COSTS 534

Rules of Court. See INTERROGATORIES, APPLICATION TO STRIKE OUT 509

Sagai Marriage—*Hulwe Caste—Limitation Act, XV of* 1877, *Schedule II, Arts.* 89, 90, 120 *and* 144.] In the Hulwe caste a valid Sagai marriage may be contracted with a widow, where there is a wife already living, provided that wife be childless. KALI CHURN SHAW *v.* DUKHY BEBEE 505

Sale in execution of Decree against Member of Joint Family. See MITAKSHARA JOINT ESTATE 112

Sale in Execution. See EVIDENCE ... 470

Secondary Evidence of possession of Board of Trade Certificate. See ACT IV OF 1875, SECTIONS 5 AND 14 ... 331

Set-off, Option of, when exercised. See CIVIL PROCEDURE CODE, SECTIONS 294, 306, 307, AND 308 181

Ship-owners, Liabilities of Goods Landed. See CARRIERS BY SEA 157

Signature to will. See SUCCESSION ACT (X OF 1865) SECTION 50 565

Slavery, Status of. See MAHOMEDAN LAW 11

Small Cause Court, Calcutta, Control of High Court over. See PRIVILEGE FROM ARREST 170

Sonthal Pergunnahs, Suits relating to Lands in—*Jurisdiction—Act XXXVII of* 1855, *section* 2—*Act VI of* 1871.] An officer in the Sonthal Pergunnahs, appointed by the Lieutenant-Governor of Bengal, under section 2 of Act XXXVII of 1855, although vested with powers of a Subordinate Judge under Act VI of 1871, has jurisdiction to try suits in regard to land, &c., where the value of the matter in dispute exceeds the value of

Sonthal Pergunnahs—*continued.*
Rs. 1,000. RAM RUNJUN CHUCKERBUTTY, IN THE MATTER OF 128

Special Court. See ACT IV OF 1875, SECTIONS 3, 4 AND 5 307

Specific Relief Act, I of 1877, section 9. See POSSESSION, SUIT FOR 278

——————, **section 21**—*Arbitration, Agreement to refer to—Bar to Suit.*] Before section 21 of the Specific Relief Act can be relied on as a bar to a suit upon a contract containing a stipulation that matters in dispute arising out of the contract shall be referred to arbitration, it must be shown that the plaintiff has refused to refer to arbitration. The filing of a suit is not such a refusal. KOMUL CHUNDER DASS *v.* CHUNDER KANT MOOKERJEA ... 284

Stat. 21, Geo. III, c. 70, section 17. See LANDLORD AND TENANT 492

—— **11 and 12 Vic., c. 21, section 13.** See INSOLVENT ACT 458

—— **17 and 18 Vic. c. 104, section 342.** See ACT IV OF 1875, SECTIONS 3, 4 AND 5 307

—— **25 and 26 Vic., c. 63, section 23.** See ACT IV OF 1875, SECTIONS 3, 4 AND 5... 307

Stay of Proceedings pending Appeal subsequently dismissed—*Execution of decree for possession merely—Mesne Profits from time of execution stayed.*] Execution of a decree for possession merely of certain land having been stayed, and the defendant, pending an appeal to the Privy Council, continued in possession by the High Court, upon his giving security for the "due performance of such order as might be made by the Privy Council," the appeal was subsequently dismissed, no order being made as to mesne profits. *Held*, on the authority of the case of *Sadasiva Pillai* vs. *Ramalinga Pillai*, 24 W.R., 193, that under the circumstances, the decree-holder was entitled to mesne profits from the date of the decree until he was put in possession; that the amount of such profits should be determined by the execution department. See, however, the case of FORESTER *v.* THE SECRETARY OF STATE, L. R. I. A., 137. GOGUN CHUNDER SIRKAR *v.* J. W. LAIDLY 189

Succession. See GIFT, CONSTRUCTION OF DEED OF... 291

—————— **Act, X of 1865, section 4.** See JUDICIAL SEPARATION, PETITION FOR... 1

——————————, **section 50**—*Will—Witness—Signature—Mark.*] It is to be implied from the language of section 50 of the Indian Succession Act (X of 1865) that the two attesting witnesses required by that section to an unprivileged will should have seen the testator sign, or affix his mark before they affix their own signatures. *Quære.*—Whether it is necessary that the witnesses should affix their actual signatures as distinguished from their marks—See FERNANDEZ *v.* ALVES, I. L. R. 3 Bom., 382. BISSONATH DINDA, *v.* DOYARAM JANA ... ...

——————————, **section 261.** See MINORS 361

—————— **by Widow.** See CONSTRUCTION OF SUNNUD 439

Suit against Assignee of Putnidar for balance due on decree for rent. See SUIT FOR RENT 62

—— **by Collector on behalf of Infant.** See MITAKSHARA JOINT ESTATE ... 112

—— **by Reversioners**—*Life Tenant, Alienation by—Waste—Right to sue for possession.*] Plaintiff, who was the reversioner of her father's estate, sued, during the lifetime of her mother who held a life estate as widow of her husband, for possession of such estate on the ground that her mother had, without reason, alienated the whole estate with a few slight exceptions, absolutely to certain persons, who had again re-sold portions thereof. The defendants pleaded that the suit would not lie in the lifetime of the plaintiff's mother. It was found that the alienations were not fraudulent. *Held*, that the plaintiff was not entitled to have possession of the property delivered to her, inasmuch as the alienation did not amount to a total destruction of the benefit derivable from the right of succession, and could not, therefore, be called waste, but that she was entitled only to a declaration that the alienation made by the widow and the subsequent alienations by her alienees should not affect or prejudice the plaintiff or reversioner's interests beyond the lifetime of the widow. MUDEN MOHUN SHAHA *v.* ANUNDMOYI ... 49

—— **for arrears of rent and ejectment of tenant.** See APPEAL 519

—— **for recovery of Immoveable property.** See CIVIL PROCEDURE CODE (ACT X OF 1877) SECTION 44, RULE (A) ... 487

—— **for Rent**—*Limitation—Suit against assignee of putnidar for balance due on decree for rent—Act VIII (B.C.) 1869, section 29—Act X of 1871, Sch. II, Art. 110.*] Plaintiff, who was the zemindar, having obtained a decree against the auction-purchaser of a putni tenure held under his zemindary for the rents of the years 1279, 1280, and 1281, and being unable to realize the whole amount due under the same, subsequently learned that A, who had purchased a share in the putni from B who derived his title from the original defendant, had been in possession during these years. He then sued A for the balance due under the first decree. This suit was filed on the 21st Baisack 1285. *Held*, that the second suit, whether it was governed by Act VIII (B.C.) of 1869 or by the general law of limitation, was

Suit for Rent—*continued.*
barred, inasmuch as it was a suit for rent, and was brought more than three years after the arrears became due. PITAMBUR SEN *v.* DEBNATH ROY CHOWDRY, 18 W. R., 132, cited and distinguished. RAM RUNJUN CHUCKERBUTTY *v.* RAM LALL MUKHOPADYA... 62

——for specific performance of contract to sell land. See CIVIL PROCEDURE CODE (ACT X OF 1877) SECTION 44, RULE (A) 487

—— to compel Registration. See REGISTRATION ACT (III OF 1877) SECTIONS 34, 35, 73, 74, 76, AND 77 172

—— to recover Chur land claimed by Government as an island and settled with Defendants 154

—— to recover immoveable property sold in Execution for debt of one Member of Joint Family. See JOINT FAMILY PROPERTY 176

—— to recover property sold by Guardian with sanction of Court under Act XL of 1858. section 18. See MINORS ... 374

—— to set aside sale in execution of decree obtained against a Member of Joint Family. See MITAKSHARA 26

Surrender by Hindu Widow to Heirs. See HINDU LAW 551

Symbolical Possession. See LIMITATION 548

Temporary Assessment of Lands gradually accreted to Permanent Tenure. See ALLUVION... 418

Tender—*Contract Act (IX of 1872), section 38.*] Under a mortgage deed taken to secure the repayment within three years of a sum of Rs. 16,000 advanced by the plaintiff, with interest at 15 per cent. from the 2nd July 1874, the date of the mortgage, it was stipulated that interest should be paid every six months, but that if a year's interest should be unpaid, when the whole amount due for principal and interest should become payable at once; and also that the mortgagor might, after payment of interest, pay towards satisfaction of the principal, any sum not less than Rs. 1,000. The first year's interest was allowed to get into arrear, but in September 1875 the defendant went to the plaintiff with Rs. 19,000, a greater sum than was due for principal and interest, and told him to repay himself from that sum. The offer was refused, and the plaintiff thereupon brought a suit on the 9th July 1877 for Rs. 16,000, with interest from the date of the mortgage to the date of the suit and subsequent interest. *Held*, that the tender made by the defendant, although not valid according to English Law, was valid under section 38 of the Indian Contract Act. *Per* WILSON, *J.*—Section 38 of the Indian Contract Act sub-

Tender.—*continued.*
stantially requires that there should be a genuine and unconditional offer, in case of payment, to pay unconditionally at a proper place, made by a person in a position to pay. KANYE LALL KHAN *v.* KHETTER MONEY DOSSEE ... 105

Tidal Unnavigable Stream. Proprietorship of. See RIPARIAN OWNERSHIP 97

Title—*Possession, Presumption of, from evidence of title—Waste lands*] In disputes as to the right to possession of jungle lands, it is only in cases where neither party has exercised any acts of ownership over the lands in question that the Court may resort to evidence of title, and presume that the party proved to have the title has also possession. RAM BANDHU *v.* KUEU BHATTU 481

———. See PUBLIC DEBT OFFICE ... 586

———, Prima Facie Evidence of. See POSSESSION, SUIT FOR 278

Transferree of Decree. See CIVIL PROCEDURE CODE (ACT X OF 1877,) SECTION 232... 253

Trusts for Maintenance. See WILL, CONSTRUCTION OF 496

Tulaba-ishtihad. See MAHOMEDAN LAW 370

Usage governing Rights of Proprietors of Contiguous Estates divided by a River. See ALLUVION 418

Variance between Case in Plaint and Evidence. See PLAINT, AMENDMENT OF 455

Void Residuary Bequests. See WILL, CONSTRUCTION OF 496

Waiver of Deposit in Cash. See CIVIL PROCEDURE CODE, SECTIONS 294, 306, 307 AND 308 181

——— See MORTGAGE 227

Watse. See SUIT BY REVERSIONER ... 49

——— Lands. See TITLE 481

Widow, Estate of, in property bequeathed or devised by husband. See HINDU LAW 561

Wife, Costs of. See JUDICIAL SEPARATION, PETITION FOR 1

Will. See HINDU LAW 561

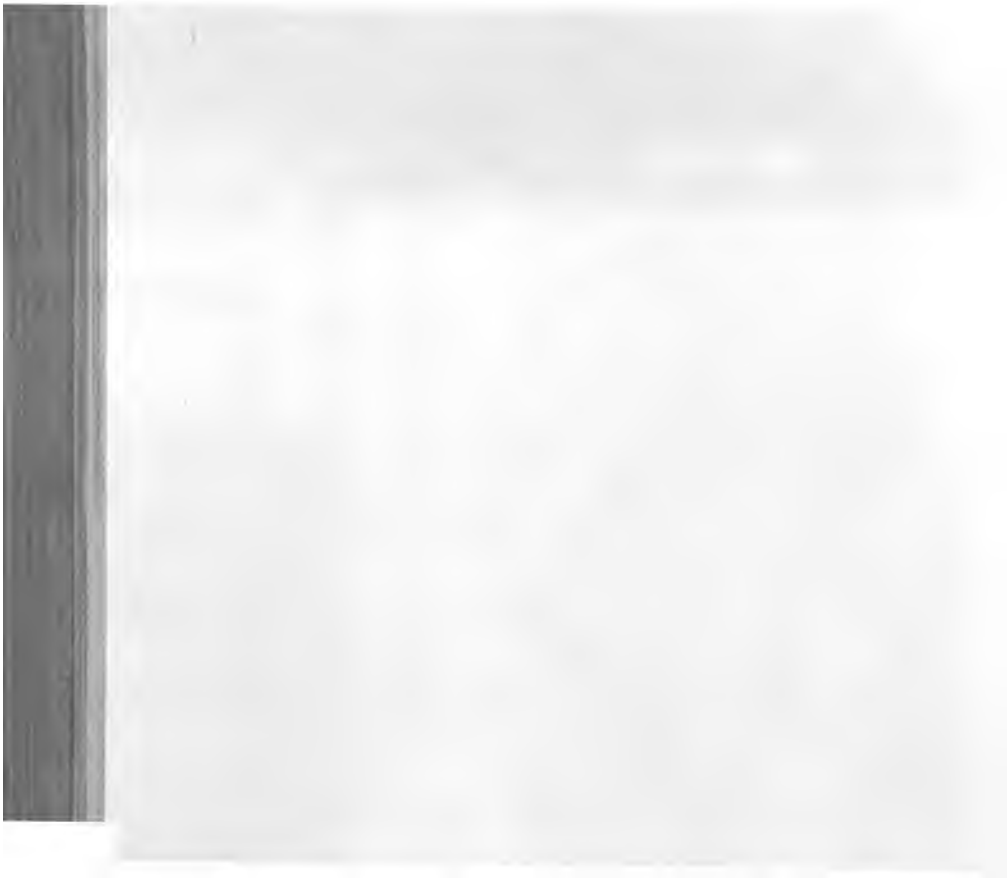
——, Construction of. See HINDU LAW 296

———. See SUCCESSION ACT (X OF 1865), SECTION 50 555

——, Construction of—*Void Residuary Bequests—Gifts to a Class—Religious Trusts—Trusts for Maintenance—Perpetuities.*] A testator by his will directed as follows:—"To my daughter A. B. I give the interest on a Government promissory note for Rs. 3,000 to be paid

Will—*continued.*
to her as the same becomes due, during her life, and if at her death there be any male issue of hers living, I give the said promissory note to be divided equally among them if more than one, and if there be no such male issue living at the death of the said A. B., the said security for Rs. 3,000 shall, thereupon, fall into the general residue of my estate." He also directed, after having bequeathed five one-sixth shares of his estate to his younger sons, that "the remaining one-sixth share shall be retained by my executors, and the income thereof accumulated and invested in Government securities until the son or sons of my eldest son H, if he shall have any son, shall attain full age, and shall thereupon be paid to such son or sons, if more than one, in equal shares * * *; and in case no son be born of my said eldest son, or no son shall attain full age, then such one-sixth share shall, on the death of the said H, be divided equally among such of my five other sons as shall then be living, and the male issue of such of them as shall then be dead, such male issue taking the share of their respective fathers." Then, after reciting that he was desirous of making, out of his immoveable property, a permanent provision for the benefit

Will—*continued.*
of his five younger sons and their male descendants, and that he was desirous of having the due forms of worship carried out after his death, he further directed that certain lands should be held by his executors on trust to apply the rents and profits, (1) in the celebration of certain poojahs and in the performance of periodical turns of worship of the family Thakoors and other religious festivals, at the same expense and on the same style as the testator himself had done, or at such expense and in such style as the executors should think fit; and (2) in the maintenance, out of the surplus, of the five younger sons, their wives, sons and male descendants, and female descendants until their marriage. *Held*, that the bequests to the children of the daughter and to the children of H were void. *Held*, also, that the trust for maintenance and the religious trusts, as being mere perpetual trusts for the benefit of the family, were likewise void. CHUNDRAMONEY DASSEE *v.* MUTILAL MULLICK 496

Witness to will. See SUCCESSION ACT (X of 1865) SECTION 50 565

Wula Law. See MAHOMEDAN LAW ... 11